CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 267.

[redacted] AS RECEIVER, APPELLANT,

vs.

GEORGE G. WILLIAMS AND JOHN S. DODD.

A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 16, 1896.

(16,212.)

(16,819.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 257.

KENT K. HAYDEN, AS RECEIVER, APPELLANT,

vs.

GEORGE G. WILLIAMS AND JOHN B. DODD.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 13, 1898.

1 United States Circuit Court of Appeals, Second Circuit.

KENT K. HAYDEN, as Receiver, Complainant, Appellant,
vs.
GEORGE G. WILLIAMS and JOHN B. DODD, Defendants, Appellants.

Certification of Questions to the Supreme Court under the Act of March 3, 1891.

This cause came before this court on January 18, 1898, upon cross-appeals from a decree of the circuit court, southern district of New York, which decreed the payment of certain moneys to the complainant. The defendants appealed from the whole decree; the complainant because it did not give him more.

Upon the argument of said appeals certain questions of law were presented as to which this court desires the instruction of the Supreme Court for its proper decision. The pleadings are annexed hereto and the facts are as follows:

Statement of Facts.

The complainant is the receiver of the Capital National Bank of Lincoln, Nebraska, which suspended payment in January, 1893, in a condition of hopeless insolvency. The stockholders, includ-
2 ing the defendants, have been assessed to the full value of their respective holdings, but the money thus obtained, added to the amount realized from the assets, would not be sufficient, even if all dividends paid during the bank's existence were repaid to the receiver, to pay 75% of the claims of the bank's creditors. This suit was brought to compel the repayment of and accounting for certain dividends paid by the bank to the defendants, as holders of capital stock of the bank of the par value of $5,000, on the ground alleged in the bill, that each of said dividends was fraudulently declared and paid out of the capital of the bank and not out of net profits. A similar suit was brought against the stockholders resident in Nebraska, and upon appeal from a decree on demurrers was sustained by the circuit court of appeals in the eighth circuit, defendants in that case conceding by their demurrers that the bank was insolvent when each dividend was paid.

The bank was organized in 1883, with a capital of $100,000, which was increased to $200,000 June 2, 1884, and to $300,000 July 21, 1886. The dividends which were paid from time to time were as follows:

Date.	Amount paid in dividends.	Defendant received.
1885, Jan. 13	$15,000	$187 50
" July 14	13,000	162 50
1886, Jan. 12	16,000	200
" July 13	14,000	175
1887, Jan. 11	18,000	300
1887, July 12	18,000	300
3 1888, Jan. 10	18,000	300
" July 10	18,000	300
1889, Jan. 8	18,000	300
" July 9	18,000	300
1890, Jan. 14	15,000	250
" July 11	15,000	250
1891, Jan. 13	15,000	250
" July 13	15,000	250
1892, Jan. 12	15,000	250
" July 12	12,000	200

All dividends except the last were paid to the defendant Williams, a stockholder to the amount of $5,000 from the organization of the bank. The last dividend was paid to defendant Dodd, who bought Williams' stock and had the same transferred to his own name December 16, 1891.

When the dividend of Jan. 6, 1889, was declared and paid, and when each subsequent dividend down to and including July, 1891, was declared and paid, there were no net profits, the capital of the bank was impaired, and the dividends were paid out of capital, but the bank was still solvent.

When the dividends of January and July, 1892, were declared and paid, there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank and received the dividends in good faith, relying on the officers of the bank and believing the dividends were coming out of profits.

4 *Questions Certified.*

Upon the facts set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision *is:*

Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of capital, when the stockholder receiving such dividend acted in entire good faith, believing the

same to be paid out of profits, and when the bank at the time such dividend was declared and paid was not insolvent?

Has a U. S. circuit court jurisdiction to entertain a bill in equity brought by the receiver of a national bank against stockholders to recover dividends which it is claimed were improperly paid when such suit is brought against two or more stockholders and embraces two or more dividends, and when the objection that there is an adequate remedy at law is raised by the answer?

March 9th, 1898.

WM. J. WALLACE.
E. HENRY LACOMBE.
N. SHIPMAN.

5 UNITED STATES OF AMERICA, *Second Circuit*, } *ss.*:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled Kent K. Hayden, as receiver, complainant, appellant, against George G. Williams and John B. Dodd, defendants, appellants, was duly filed and entered of record in my office by order of said court on the 10th day of March, 1898, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of New York, this 10th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN,
Clerk United States Circuit Court of Appeal- for the Second Circuit.

6 In the Circuit Court of the United States for the Southern District of New York, in the Second Circuit. In Equity.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Complainant,
vs.
GEORGE G. WILLIAMS and JOHN B. DODD, Defendants.

Bill.

To the judges of the circuit court of the United States for the southern district of New York:

Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, brings this his bill against George G. Williams and John B. Dodd, and therefore your orator complains and says that

7 the said Capital national bank is a banking association duly organized under and by virtue of the laws of the United

States, and located at Lincoln in the State of Nebraska, which said bank, from about the 2d day of June, 1884, until on or about the 23d of January, 1893, was engaged in the business of banking at the place last aforesaid under the laws of the United States, on or about which last-mentioned day said Capital National Bank of Lincoln failed, became and was insolvent, and the Comptroller of the Currency of the United States became and was satisfied of the insolvency of said bank, and thereupon, on or about the 6th day of February of the year last aforesaid, after due examination of affairs of said bank, the said Comptroller of the Currency appointed and duly commissioned John D. Macfarland receiver of the said association; that said Macfarland qualified as such receiver and entered upon the duties of said office and proceeded to close up the said association; on or about the 4th day of May of the year last aforesaid, the said Macfarland resigned his said office of receiver of said bank, which resignation was duly accepted by the said comptroller, and on or about the 8th day of May of the year last aforesaid, your orator, by the name and designation of K. K. Hayden, was by the said Comptroller of the Currency of the United States duly appointed receiver of the said Capital National Bank of Lincoln, to succeed the said Macfarland; that on or about the 31st day of said last-mentioned month of the year last aforesaid, your orator having duly qualified as such receiver of said Capital National Bank of Lincoln, entered upon the duties of said office, took possession of said bank, its books, records, assets and effects, proceeded to close up said bank, is now engaged in closing and winding up the affairs of such bank; and

that this suit is brought, and bill filed for the purpose of
8 closing and winding up the affairs of such bank, of collecting its assets and effects, converting them into money and distributing it amongst the depositors and other creditors of said bank, *pro rata*, to their several and respective just claims and demands.

Your orator further showeth to your honors that the said Capital National Bank of Lincoln was organized as a national banking institution on or about the 2d day of June, 1884, from which last-mentioned day until the day of its failure, as hereinbefore set forth and stated, the said bank was engaged as aforesaid in doing a general banking business under the laws of the United States at the place last aforesaid; that from the date of its organization as aforesaid up to the date of its failure, as hereinbefore stated, the said bank, while it did a large business and received large sums of money on deposit, its expense account was large, and at different times and dates between the time and date of the organization of the said bank and the time and date of its failure, as hereinbefore stated, it met with and sustained great and heavy losses in its business, and that by reason of such losses, within less than six months after its organization and commencement of business as aforesaid, the capital of said bank became and was greatly impaired; that on the 31st day of December, 1884, the capital of said bank was greatly impaired as aforesaid, and there were no net earnings nor clear profits of the business of said bank theretofore done and transacted; that thereafter, on or about the second Tuesday of January, 1885,

the directors of said bank, theretofore duly elected by the shareholders of said bank, duly qualified and acting as such directors, that is to say, the following-named persons: Charles W. Mosher, Richard C. Outcault, David E. Thompson, Ambrose P. S. Stuart, Charles E. Yates, Ellis P. Hamer, Rolla O. Phillips and William W. Holmes, since deceased, at a regular meeting of said directors as a board of directors of said bank, unlawfully, fraudulently and with intent to further impair the capital of said bank and defraud the said bank and its creditors, ordered and declared a dividend for the half year ending December 31st, 1884, of six and a half per centum upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank, according to their several and respective holdings of the shares of the stock of said bank; that in intended pursuance of the said order and direction of said directors, on or about the said second Tuesday in January, 1885, the same being the 13th day of January of said year, the said bank out of its capital and to the further impairment thereof, and not out of net earnings theretofore earned and accumulated by said bank, paid and delivered to the said defendant, George W. Williams, $187.50.

That the officers of said bank whose duty it was to cast up and state the amount payable to each one of the said shareholders, by accident and mistake of fact, instead of casting up and stating the same upon a ratio of six and one-half per centum upon the amount of the capital of said bank, did in fact cast up and stated the same at the rate of seven and one-half per centum of said capital, which several amounts, so by accident and mistake of fact cast up and stated at sums respectively of one per cent. greater than was intended by the said directors, were by the said bank by mistake of fact paid to and retained by said shareholders respectively, which said several sums of money then and there accepted, received and retained by the said parties respectively thereby became and were impressed and chargeable with a trust in favor of the said bank, and were held by said party receiving the same as aforesaid respectively in trust to repay the same, for the purpose of restoring the said capital, making good its said impairment and paying the just debts of the said bank, but that the said defendant has not paid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 30th day of June, 1885, the said bank, although continuing to do and doing a large business, and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained great and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by means of the losses met and sustained by the said bank in its said business, as above stated, the capital of said bank became and was more greatly impaired; that bills receivable owned and held by said bank, and representing large amounts of its capital, had become and were bad debts, and should by law and usage have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper;

that on or about the second Tuesday, being the 14th day of July of the year last aforesaid, the said board of directors of said bank, which was then composed of the same persons as at the time of declaring the first dividend, as hereinbefore stated, acting as such board of directors, unlawfully, fraudulently, and with intent to further impair the capital of said bank and defraud the said bank and its creditors, ordered and declared a dividend for the half year ending June 30th, 1885, of six and one-half per centum upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and re-
11 spective holdings of the shares of the stock of said bank; that, in pursuance of the said order and declaration of said directors, on or about the said 14th day of July, the same being the second Tuesday of said month, 1885, the said bank, out of its capital, to the still further impairment thereof, and not out of the net earnings thereof theretofore earned or accumulated by said bank, paid and delivered to the said defendant George G. Williams $162.50, which said sum of money, then and there accepted, received and retained by the said party, thereby became and was impressed and charged with a trust in favor of the said bank, and was held by said party receiving the same as aforesaid in trust for the said bank to repay the same, for the purpose of restoring the said capital, making good its said impairment and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him, nor any part thereof.

Your orator further showeth unto your honors that on the 31st day of December, 1885, the said bank, although still continuing to do and doing a large business and having large sums of money on deposit, yet its expense and interest accounts being large and it having met with and sustained great and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of the losses met and sustained by the said bank in its said business as above stated, the capital of said bank became and was still more greatly impaired; that bills receivable, owned and held by said bank and representing large amounts of its capital, become and were bad debts and were then known to be bad debts by the officers and directors of the said bank, and should by law and usage have been charged off the books of said bank, yet the same
12 continued to be carried on the said books as good paper. That on or about the 12th day of January, 1886, the same being the second Tuesday of said month, the said board of directors of said bank, which was then composed of the same persons as at the time of declaring the first and second dividends as hereinbefore stated, at a regular meeting of said board and acting as such board of directors unlawfully, fraudulently and with intent to further impair the capital of said bank and defraud the said bank and its creditors, ordered and declared a dividend for the half year ending December 31, 1885, of eight per centum upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the

shares of the stock of said bank; that in pursuance of the said order and declaration of said directors, soon thereafter, but upon what particular day or days of the said last-mentioned month in the year last aforesaid your orator is unable to state with precision, the said bank out of its capital, to the still greater and further impairment thereof, and not out of net earnings thereof theretofore earned or accumulated by said bank, paid and delivered to the said defendant George G. Williams $200, which said sum of money then and there paid to, accepted, received and retained by the said party, thereby become and was impressed and chargeable with a trust in favor of the said bank and was held by such party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said capital, making good its said impairment and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him or any part thereof.

Your orator further showeth unto your honors that on the
13 30th day of June, 1886, the said bank, although still continuing to do and doing a large business and having large sums of money on deposit, yet its expense and interest accounts being large and it having met with and sustained great and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of the losses met and sustained by the said bank in its said business as above stated, the capital of said bank had become and was still more greatly impaired; that bills receivable owned and held by said bank and representing large amounts of its capital, became and were bad debts, and were then known to be bad debts by the officers and directors of the said bank, and should by law and usage have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper. That on or about the 13th day of July, 1886, the said board of directors of said bank, which was then composed and constituted of the same persons as at the time of the declaring of the first, second and third dividends as hereinbefore severally stated at a regular meeting of said board, and acting as such board of directors, unlawfully, fraudulently and with intent to further impair the said capital of said bank and defraud the said bank and its creditors, ordered and declared a dividend for the half year ending on the 30th day of June, 1886, of seven per centum upon the capital of said bank to be divided amongst and paid to, the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank; that soon thereafter, but upon what day or days of the said last-mentioned month in the year last aforesaid your orator is unable to state with precision, the said bank out of the capital of said bank to the still greater and further impair-
14 ment thereof, and not out of net earnings thereof theretofore earned or accumulated by said bank, paid and delivered to said defendant, George G. Williams, $175, which said sum of money then and there paid to, accepted, received and retained by the said party thereby become and was impressed and charged with a trust

in favor of the said bank, and was held by such party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said capital, making good its said impairment and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 31st day of December, 1886, the said bank, although still continuing to do and doing a large business, and had large sums of money on deposit, yet, its expense and interest accounts being large, and it having met with and sustained great and heavy losses in its business, had no net earnings nor clear profits of the business of said bank, theretofore done and transacted; that by reason of the losses met and sustained by the said bank in its said business, as above stated, the capital of said bank had become and was still more greatly impaired; that bills receivable, owned and held by said bank and representing large amounts of its capital, some before and some after the declaration and distribution and payment of the dividend of July, 1886, as hereinbefore set out and stated, had become and were bad debts and were at all times known by the officers and directors of the said bank to be bad debts and should by law and the custom, rules and usage of banks and bankers have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank. That on or about the 11th day of January, 1887, the said board of directors of said bank, which was still composed and constituted of the same persons as at the times of declaring the first, second, third and fourth dividends, as hereinbefore severally stated, at a regular meeting of said directors, and acting as such board of directors, unlawfully, fraudulently and with the intent to still further impair the capital of said bank and to defraud its creditors, ordered and declared a dividend for the half year ending December 31, 1886, of six per centum upon the capital of said bank to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank; that soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, the said bank, out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings theretofore earned or accumulated by said bank, paid and delivered to said George G. Williams $300, which said sum of money then and there paid to, received, accepted and retained by the said party thereby became and was impressed and charged with a trust in favor of the said bank, and was held by such party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said impairment and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 30th day of June, 1887, the said bank, although still continuing to do and

doing a large business and having large sums of money on
16 deposit, yet its expense and interest accounts being large and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of the losses met and sustained by the said bank in its said business, as above stated, the capital of said bank became and was still more greatly impaired; that bills receivable, owned and held by said bank and representing large amounts of its capital, some before and some after the declaration, distribution and payment of the dividends of January, 1887, as hereinbefore set out and stated, had become and were bad debts and were at all times known by the officers and directors of the said bank to be bad debts, and should by law and custom, rules and usages of banks and bankers have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank.

That on or about the 12th day of July, 1887, the said board of directors of said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth and fifth dividends as hereinbefore severally stated, at a regular meeting of said directors and acting as such board of directors of said bank, unlawfully, fraudulently and with the intent to still further impair the capital of said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending June 30, 1887, of six per centum upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank; that soon thereafter, but upon what particular day or days of the said last-mentioned
17 month of the year last aforesaid your orator is unable to state with precision, the said bank, out the capital of said bank to the still greater and further impairment thereof and not out of the net earnings or clear profits theretofore earned or accumulated by said bank, paid and delivered to the said defendant as shareholder of the capital stock of said bank, that is to say, to the said defendant, George G. Williams, $300, which said sum of money then and there paid to, accepted and received by the said party, thereby became and was impressed and charged with a trust in and for the said bank, and was and still is held by said party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors, that on the 31st day of December, 1887, the said bank, although still continuing to do and doing a large business and having large sums of money on deposit, yet its expense and interest accounts being large and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of losses met and

sustained by the said bank in its said business as hereinbefore stated and the unlawful and injudicious division amongst and payment to its shareholders by the said bank of large sums of money as dividends, though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable, owned and held by said bank and representing large amounts of its capital, some before and some after the declaration, distribution and
18 payment of the dividend of July, 1887, as hereinbefore set out and stated, had become and were bad debts, and were at all times known by the officers and directors of the said bank to be bad debts and should by law and the custom, rules, and usage of banks and bankers, to have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank; that on or about the 10th of January, 1888, the said board of directors of the said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth, fifth, and sixth dividends as hereinbefore stated, at a regular meeting of said directors and acting as such board of directors of said bank, unlawfully, fraudulently, and with intent to further impair the capital of said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending December 31, 1887, of six per centum upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank. That soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, the said bank, out of the capital of said bank, to the still greater and further impairment thereof and not out of the net earnings nor clear profits theretofore earned or accumulated by said bank, paid and delivered to said defendant as shareholder of the capital stock of said bank, that is to say, to the said defendant, George G. Williams, $300, which said sum of money then and there paid to, received, and accepted by the said party, thereby become and was im-
19 pressed and charged with a trust in favor of the said bank, and was still held by the party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not paid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 30th day of June, 1888, the said bank, although still continuing to do and doing a large business and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of such losses met with and sustained — the said bank in its said business, as hereinbefore stated, and the unlawful and injudicious division amongst and payment to its shareholders by the said bank of large sums of

money as dividends though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable owned and held by the said bank and representing large amount of its capital, some before and some after the declaration, distribution, and payment of the dividend of January, 1888, as hereinbefore set forth and stated, had become and were bad debts, and were at all times known by the officers and directors of said bank to be bad debts, and should by law and the custom, rules, and usage of banks and bankers have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank; that on or about the 10th day of July, 1888, the said board of directors of the said bank, which was still composed and constituted of the same persons as at the time of the first, second, third, fourth, fifth, sixth and seventh dividends as hereinbefore stated, at a regular meeting as such board of directors of such bank, unlawfully, fraudulently and with the intent to further impair the capital of the said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending June 30, 1888, of six per centum upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of the said bank. That soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with certainty or precision, the said bank out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings nor clear profits by said bank earned or accumulated by said bank, paid and delivered to the said defendant as shareholder of the capital stock of said bank, that is to say, to the said defendant, George G. Williams, $300, which said sum of money then and there paid to, received and accepted by the said party, thereby become and was impressed and charged with a trust in favor of the said bank, and still are held by the party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not paid the money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 31st day of December, 1888, the said bank, although still continuing to do and doing a large business, and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of such losses met with and sustained in its business as hereinbefore stated, and the unlawful and injudicious division amongst and payment to its shareholders by the said bank of large sums of money as dividends though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable owned and held by said bank and representing large amounts of its capital,

some before and some after the declaration, distribution and payment of the dividend of July 10, 1888, as hereinbefore set forth and stated, had become and were bad debts and were at all times known to the directors and officers of said bank to be bad debts and should by law and the custom, rules and usages of banks and bankers have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and representing so much of the capital of the said bank; that on or about the 9th day of January, 1889, the said board of directors of the bank, which was composed and constituted of the same persons as at the time of the first, second, third, fourth, fifth, sixth, seventh and eighth dividends as hereinbefore stated, at a regular meeting as such board of directors of such bank, unlawfully, fraudulently and with the intent to further and more greatly impair the capital of said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending December 31, 1888, of six per centum of the capital of said bank to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank. That soon thereafter, but upon what particular day
22 or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with certainty and precision, the said bank, out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings nor clear profits by said bank earned or accumulated by said bank, paid and delivered to the said defendant as shareholder of the capital stock of said bank, that is to say, to the said George G. Williams, $300, which said sum of money then and there paid to, received and accepted by the said party, thereby become and was impressed and charged with a trust in favor of the said bank, and was and still is held by such party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not paid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 30th day of June, 1889, the said bank, although still continuing to do and doing a large business and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of losses met and sustained by the said bank in its said business, as hereinbefore stated, and the unlawful and injudicious division amongst and payment to its shareholders by the said bank, of large sums of money as dividends, though unearned, the capital of said bank had become and was still more impaired; that bills receivable owned and held by said bank and representing large amounts of its capital, some before and
23 some after the declaration, distribution and payment of the dividend of January, 1889, as hereinbefore set out and stated, had become and were bad debts, and were at all times known by the

officers and directors of the said bank to be bad debts, and should by law and the custom, rules and usage of banks and bankers to have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank; that on or about the 10th day of July, 1889, the said board of directors of the said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth dividends, as hereinbefore stated, at a regular meeting of said directors, and acting as such board of directors of said bank, unlawfully, fraudulently and with intent to further impair the capital stock of the said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending June 30th, 1889, of six per centum upon the capital of said bank to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank. That soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, *that* said bank, out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings nor clear profits theretofore earned or accumulated by said bank, paid and delivered to said defendant as shareholder of the capital stock of said bank, that is to say, to the said defendant, George G. Williams, $300, which said sum of money then and there paid
24 to, received and accepted by the said party thereby become and was impressed and charged with a trust in favor of the said bank, and was and still is held by such party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 31st day of December, 1889, the said bank, although still continuing to do and doing a large business, and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of losses met and sustained by the said bank in its said business, as hereinbefore stated, and the unlawful and injudicious division amongst and payment to its shareholders by the said bank of large sums of money as dividends, though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable owned and held by said bank, and representing large amounts of its capital, some before and some after the declaration, distribution and payment of the dividend of July, 1889, as hereinbefore set out and stated, had become and were bad debts, and were at all times known by the officers and directors of the said bank to be bad debts, and should by law and the custom, rules and usage of banks and bank-

ers, to have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank; that on or about
25 the 15th of January, 1890, the said board of directors of the said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth dividends, as hereinbefore stated, at a regular meeting of said directors, and acting as such board of directors of said bank, unlawfully, fraudulently and with the intent to further impair the capital of the said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending December 31, 1889, of five per centum upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank. That soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, the said bank, out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings nor clear profits theretofore earned or accumulated by said bank, paid and delivered to the said defendant as shareholder of the capital stock of said bank, that is to say, to the said defendant, George G. Williams, $250, which said sum of money then and there paid to, received and accepted by the said party thereby become and was impressed and charged with a trust in favor of the said bank, and was and still is held by such party receiving the same, as aforesaid, in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him, nor any part thereof.

26 Your orator further showeth unto your honors that on the 30th day of June, 1890, the said bank, although still continuing to do and doing a large business, and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear clear profits of the business of said bank theretofore done and transacted; that by reason of losses met and sustained by the said bank in its said business as hereinbefore stated, and the unlawful and injudicious dividends amongst and payment to its shareholders by the said bank of large sums of money as dividends, though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable owned and held by said bank, and representing large amounts of its capital, some before and some after the declaration, distribution and payment of the dividend of January, 1890, as hereinbefore set out and stated, had become and were bad debts, and were at all times known by the officers and directors of the said bank to be bad debts, and should by law and the custom, rules and usage of banks and bankers to have been charged off the books of said bank, yet the same continued to be carried on the said books

as good paper, and to represent so much of the capital of said bank; that on or about the 9th day of July, 1890, the said board of directors of the said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh dividends, as hereinbefore stated, at a regular meeting of said directors, and acting as such board of directors of said bank, unlawfully, fraudulently and with intent to further impair the capital of the said bank, and to defraud the said bank and its creditors, ordered and declared
27 a dividend for the half year ending June 30th, 1890, of five per centum upon the capital of said bank to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank. That soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, the said bank out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings nor clear profits theretofore earned or accumulated by said bank, paid and delivered to said defendant George G. Williams, as shareholder of the capital stock of said bank, the sum of $250, which said sum of money then and there paid to, received and accepted by the said party thereby become and was impressed and charged with a trust in favor of the said bank, and was and still is held by the party receiving the same as aforesaid in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 31st day of December, 1890, the said bank, although still doing and continuing to do a large business and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of losses met and sustained by the said bank in its said business as hereinbefore stated, and the unlawful and injudicious division amongst and
28 payment to its shareholders by the said bank of large sums of money as dividends though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable, owned and held by said bank, and representing large amounts of its capital, some before and some after the declaration, distribution and payment of the dividend of July, 1890, as hereinbefore set out and stated, had become and were bad debts, and were at all times known by the officers and directors of the said bank to be bad debts, and should by law and the custom, rules and usage of banks and bankers to have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper, and represented so much of the capital of said bank; that on or about the 15th day of January, 1891, the said board of directors of the said bank, which was still composed and constituted

of the same persons as at the times of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth dividends, as hereinbefore stated, at a regular meeting of said directors, and acting as such board of directors of said bank, unlawfully, fraudulently and with the intent to further impair the capital of the said bank, and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending December 31, 1890, of five per centum, upon the capital of said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank.

That soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, the said bank, out of the capital of said bank, to the still greater and further impairment
29 thereof and not out of the net earnings nor clear profits theretofore earned or accumulated by said bank, paid to and delivered to said defendant as shareholder of the capital stock of said bank, that is to say, to the said defendant, George G. Williams, $250, which said sum of money then and there paid to, received and accepted by the said party, thereby become and was impressed and charged with a trust in favor of the said bank and was and still is held by the party receiving the same as aforesaid, in trust for the said bank to repay the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors, that on the 30th day of June, 1891, the said bank, although still continuing to do and doing a large business and having large sums of money on deposit, yet its expense and interest accounts being large and it having met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of losses met and sustained by the said bank in its said business as hereinbefore stated, and the unlawful and injudicious division amongst and payment to its shareholders by the said bank of large sums of money as dividends, though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable owned and held by said bank and representing large amounts of its capital, some before and some after the declaration, distribution and payment of the dividend of December, 1890, as hereinbefore set out and stated, had become and were bad debts and were at all times known by the officers and directors of the said bank to be bad debts
30 and should by law and the custom, rules and usages of banks and bankers, to have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank; that on or about the 17th day of July, 1891, the said board of directors of the said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth, fifth, sixth,

seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth dividends as hereinbefore stated, at a regular meeting of said directors of said bank, unlawfully, fraudulently and with the intent to further impair the capital of said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending June 30th, 1891, of five per centum upon the capital of the said bank, to be divided amongst and paid to the shareholders of the said bank according to their several and respective holdings of the shares of the capital stock of said bank. That soon thereafter, but upon what particular day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, the said bank, out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings nor clear profits theretofore earned or accumulated by said bank paid and delivered to said defendant as shareholder of the capital stock of said bank, that is to say, to the said defendant, George G. Williams, $250, which said sum of money then and there paid to, received and accepted by the said party, thereby become, was impressed and charged with a trust in favor of the said bank and was and still is held by the party receiving the same as aforesaid, in trust for the said bank to repay the same for the purpose of
31 restoring the said impairment of said capital and paying the just debts of the said bank, but that said defendant has not repaid the said money so received by him, nor any part thereof.

Your orator further showeth unto your honors that on the 31st day of December, 1891, the said bank, although still continuing to do and doing a large business and having large sums of money on deposit, yet its expense and interest accounts being large, and it having met with and sustained many and heavy losses in its said business, had no net earnings nor clear profits of the business of said bank theretofore done and transacted; that by reason of losses met and sustained by the said bank in its said business as hereinbefore stated, and the unlawful and injudicious division amongst and payment to its shareholders by the said bank of large sums of money as dividends, though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable, owned and held by said bank and representing large amounts of its capital, some before and some after the declaration, distribution and payment of the dividend of July, 1891, as hereinbefore set out and stated, had become and were bad debts, and were at all times known by the officers and directors of the said bank to be bad debts, and should by law and the custom, rules and usage of banks and bankers to have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank; that on or about the 13th day of January, 1892, the said board of directors of the said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth dividends as hereinbefore stated at a regular meeting
32 of the said directors, and acting as such board of directors of

said bank, unlawfully, fraudulently, and with the intent further impair the capital of the said bank and to defraud the sa bank and its creditors, ordered and declared a dividend for the ha year ending December 31, 1891, of 5 per centum upon the capita of said bank to be divided amongst and paid to the shareholders the said bank according to their several and respective holding of the shares of the capital stock of said bank. That soon there after, but upon what particular day or days of the said last-men tioned month of the year last aforesaid your orator is unable to stat with precision, the said bank, out of the capital of said bank, to th still greater and further impairment thereof and not out of net earn ings nor clear profits theretofore earned or accumulated by sai bank, paid and delivered to said defendant as shareholder of the capital stock of said bank—that is to say, to the said defendan George G. Williams, $250, which said sum of money then and there paid to, received, and accepted by the said party thereby became and was impressed and charged with a trust in favor of the said bank, and was and still is held by the party receiving the same as aforesaid in trust for the said bank to repay the same for the pur pose of restoring the said impairment of said capital and paying the just debts of said bank, but that the said defendant has not re paid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that on the 30th day of June, 1892, the said bank, although still continuing to do and doing a large business and having large sums of money on de posit, yet its expense and interest accounts being large and it hav ing met with and sustained many and heavy losses in its business, had no net earnings nor clear profits of the business of said 33 bank theretofore done and transacted; that by reason of losses met and sustained by the said bank in its said busi ness, as hereinbefore stated, and the unlawful and injudicious di vision amongst and payment to its shareholders by the said bank of large sums of money as dividends, though unearned, the capital of said bank had become and was still more greatly impaired; that bills receivable owned and held by said bank and representing large amounts of its capital, some before and some after the decla ration, distribution, and payment of the dividend of December, 1891, as hereinbefore set out and stated, had become and were bad debts, and were at all times known by the officers and directors of the said bank to be bad debts, and should by law and the custom, rules, and usage of banks and bankers to have been charged off the books of said bank, yet the same continued to be carried on the said books as good paper and to represent so much of the capital of said bank; that on or about the 13th day of July, 1892, the said board of di rectors of the said bank, which was still composed and constituted of the same persons as at the times of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thir teenth, fourteenth, and fifteenth dividends, as hereinbefore stated, with the exception of Richard C. Outcalt, in place of William W. Holmes, deceased, at a regular meeting of said directors and acting as such board of directors of said bank, unlawfully, fraudulently

and with intent to further impair the capital stock of the said bank and to defraud the said bank and its creditors, ordered and declared a dividend for the half year ending June 30th, 1892, of four per centum upon the capital of said bank to be divided amongst and paid to the shareholders of the said bank according to their
34 several and respective holdings of the shares of the capital stock of said bank. That soon thereafter but upon what day or days of the said last-mentioned month of the year last aforesaid your orator is unable to state with precision, the said bank, out of the capital of said bank, to the still greater and further impairment thereof, and not out of net earnings nor clear profits theretofore earned or accumulated by said bank, paid and delivered to said defendant, as shareholder of the capital stock of said bank, that is to say, to the said defendant John B. Dodd, $200, which said sum of money then and there paid to, received and accepted by the said party thereby become and was impressed, and charged with a trust in favor of the said bank and was and still is held by the party receiving the same for the purpose of restoring the said impairment of said capital and paying the just debts of the said bank, but that the said defendant has not repaid the said money so received by him nor any part thereof.

Your orator further showeth unto your honors that the total amounts of dividends received by each of said defendants, arising from and being the proceeds of the various wrongful dividends heretofore described, are as follows, that is to say, the said defendant George G. Williams received the aggregate sum of $3,775; John B. Dodd, $200.

That there were other shareholders to whom large sums of money were unlawfully and fraudulently paid and delivered by said bank as dividends at the several and respective dates and times of the declaration and distribution of dividends to and amongst the shareholders of said bank, as hereinbefore stated, and the reason why said other shareholders have not been included and sued in this action is that they are not residents of this State nor found therein.

35 Your orator further showeth unto your honors that at the several times and dates of the orders and declarations of dividends by the directors of said bank, as hereinbefore set out and stated, and at all times since the 2d day of January, 1888, inclusive, the said bank has been insolvent.

Your orator further showeth unto your honors that the affairs of said Capital National Bank of Lincoln, at the time and date of the commencement of this suit and the filing of this bill remain and are in an unsettled state and condition; that the total assets of said bank upon a careful estimate thereof at the date of the same passing into the hands of a receiver *was* found to be of the face value of $979,844.96, $433,053.82 of which is alleged to be bad debts and absolutely worthless; that of these assets $331,359.86 were and still are held by other banks, having been sold to them, so that in reality the total amount of assets of said bank amount to only $648,485.10. That claims have already been allowed against the said bank to the amount of $833,576.98, and that claims have been presented to the

receiver and not allowed to the amount of $415,317.84, leaving
nominal deficit of assets below claims allowed of $184,091.88. Th
of the said unallowed claims the sum of $10,000 is in judgment du
recorded in the district court of Lancaster county, State of Nebrask
on which judgment has been issued and returned unsatisfied.

That the said several sums of money wrongfully paid to and r
ceived by the shareholders as dividends out of the capital of sai
bank, as hereinbefore set forth and stated, amount in the aggregat
to the sum of $253,000.

Your orator further showeth unto your honors that in pursuanc
of the unlawful and fraudulent intent to impair the capit
36 of said bank, and to defraud said bank and its creditors, th
said directors and officers of said bank, by various and sun
dry fraudulent representations and false reports to the Comptrolle
of the Currency of the United States, so concealed the impairmen
of the capital of said bank and the unlawful and fraudulent characte
of said dividends as hereinbefore set forth and stated, so that th
same was unknown by the Comptroller of the Currency of the Unite
States, creditors of said bank or the general public, until the date o
the failure of said bank and its passing into the hands of an office
of the Government, on or about January 23, 1893.

And your orator alleges that while the said impairment of th
capital of said bank, the oft-repeated fact of the declaration and dis
tribution of large sums of money to and amongst the said share
holders, as dividends, when there were no net earnings nor clea
profits of the business of said bank on hand to be distributed, wa
well and long known to many of the defendants, yet the same a
well as all facts and circumstances pointing to, or indicating such
state or condition of said bank, or such a course or practice on th
part of its officers and directors, were carefully concealed from it
depositors and other creditors and that no such facts nor circum
stances, nor any fact sufficient to put a prudent person upon an in
quiry which would have led to a knowledge of such facts or ci
cumstances were known to or discovered by any depositor or othe
creditor of said bank, nor his or their representative, until on o
about the 23d day of January, 1893.

In tender consideration whereof, and forasmuch as your orator i
entirely remediless by the strict rules of the common law, and ca
only have relief in a court of equity, where matters of thi
37 nature are properly cognizable and relievable to the end, there
fore, that the said defendants and their confederates, whe
discovered, may full, true, direct and perfect answers make (an
answers under oath of the said defendants, and of each of them, ar
hereby waived), to all and singular the statements, allegations
charges and matters hereinbefore stated, alleged and charged a
fully, specifically and particularly as if the same were hereinafte
repeated, and they and each of them thereunto severally and dis
tinctly interrogated.

Your orator prays the decree of this honorable court, that the sai
several acts of the said directors of the said Capital National Bank
of Lincoln, ordering, declaring, distributing amongst and paying t

the said shareholders the several and respective sums of money, as in this bill set out and stated, as dividends, were unlawfully, wrongfully and fraudulently ordered, declared, distributed and paid out, and that said moneys to be restored and paid back to the said bank or the receiver thereof, to be paid out amongst the depositors and other creditors of said bank, in manner provided by law. That this honorable court may decree, ascertain and settle the relative amount and value of the assets of said bank other than and aside from the said moneys paid to, received by and now in the hands of said shareholders as aforesaid, and the debts and demands allowed and allowable against the said bank, and your orator, as receiver thereof, and that the said several and respective respondents be decreed to repay to your orator the total aggregate sums of money paid to and received by them, and each of them, respectively, that is to say, that the defendant George G. Williams be decreed to pay the sum of $3,775, and John B. Dodd the sum of $200, or that each of said respondents pay a sum bearing the same proportion to the said
38 aggregate sum so received by them respectively as the aggregate amount of the claims against said bank, allowed and allowable, bear to the assets of said bank, together with lawful interest on such sums severally paid to and received by said several respondents as dividends to shareholders of said bank as hereinbefore stated.

That your orator may be decreed to recover the costs of this action, and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your honors to grant to your orator the writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said George G. Williams and John B. Dodd, thereby commanding them, and each of them, at a certain day, and under a certain penalty therein to be expressed, to appear before your honors in this honorable court, then and there to answer the premises, and to stand and abide by such order and decree therein as to your honors shall seem meet and as shall be agreeable to equity and good conscience, and your orator shall ever pray.

EDWARD WINSLOW PAIGE,
Solicitor for the Complainant, 44 Cedar Street, New York.

EDWARD WINSLOW PAIGE, *Of Counsel.*

39 In the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln,
against
GEORGE G. WILLIAMS and JOHN B. DODD. } In Equity.

The Answer of George G. Williams, one of the Defendants, to the Bill of Complaint of the Above-named Complainant.

This defendant, now and at all times hereafter, saving and reserving to himself all and all manner of benefit or advantage of exception or otherwise, that can or may be had to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer to, answering, says:

1. That he admits that said Capital national bank mentioned in said bill of complaint, was organized as a national banking association under the laws of the United States in the manner and form and at the time in said bill set forth and averred, and that said bank from the date of said organization and until on or about the 23d day of January, 1893, was engaged in and carried on the busi-
40 ness of banking at Lincoln, Nebraska, under the laws of the United States, and that on or about said last-mentioned day said Capital National Bank of Lincoln failed, became and was insolvent, and that thereupon John D. Macfarland was appointed receiver of said bank, and thereafter resigned his said office, and that the complainant was duly appointed receiver of said bank to succeed said Macfarland, and that said complainant is now the duly appointed and qualified receiver of said bank in manner and form as in said bill set forth.

2. And further answering, this defendant denies that at different times and dates between the time and date of the organization of the said bank and the time and date of its failure as in said bill stated, the said bank met with and sustained great and heavy losses in its business, and denies that by reason of such losses, or by reason of any other cause, within less than six months after its organization and commencement of business the capital of said bank became and was greatly impaired; and denies that on or prior to the 31st day of December, 1884, or between said last-named date and the 30th day of June, 1885; or between June 30th, 1885, and December 31st, 1885; or between December 31st, 1885, and June 30th, 1886; or between June 30th, 1886, and December 31st, 1886; or between December 31st, 1886, and June 30th, 1887; or between June 30th, 1887, and December 31st, 1887; or between December 31st, 1887, and June 30th, 1888; or between June 30th, 1888, and December 31st, 1888; or between December 31st, 1888, and June 30th, 1889; or between June 30th, 1889, and December 31st, 1889; or between December 31st, 1889, and June 30th, 1890; or between June 30th, 1890, and December 31st, 1890; or between

December 31st, 1890, and June 30th, 1891; or between June
41 30th, 1891, and December 31st, 1891; or between December 31st, 1891, and June 30th, 1892, said bank met with and sustained great and heavy losses, or any losses in its business, and denies that during any of said times, the said bank had no net earnings nor clear profits of the business of said bank theretofore done and transacted, and denies that during any of said times by means of losses met and sustained by the said bank in its said business, as in said bill alleged, or otherwise, the capital of said bank became or was impaired; and denies that during any of said times bills receivable owned and held by said bank and representing large amounts, or any part of its capital became or were bad debts or were known by the officers or directors of said bank to be bad debts or should by law and usage have been charged off the books of said bank, and denies that any bills receivable of the character and description in said bill alleged which had become bad debts and which should by law and usage have been charged off the books of said bank (if any such there were) continued to be carried on said books as good paper or to represent so much of the capital of said bank, and denies that during any of said times or upon any of the dates or days specified in said bill the board of directors unlawfully or fraudulently or with intent to impair the capital of the bank or to defraud the said bank or its creditors ordered or declared any dividend to be divided amongst or paid to the shareholders of said bank or to this defendant.

3. And further answering, this defendant denies that said bank has paid or delivered to him any dividends or money out of the capital of said bank and not out of net earnings nor clear profits theretofore earned or accumulated, and denies that any of the sums paid by said bank to the defendants as dividends, as set forth
42 in said bill, was or is impressed or charged with a trust in favor of said bank, and denies that any of said sums of money was or still is held by the party receiving the same in trust for the said bank to repay the same for the purpose of restoring any impairment of capital or paying the debts of said bank.

4. And further answering, this defendant denies that at the several times and dates of the order and declaration of dividends by the directors of said bank as in said bill set out and stated, and at all times since the 2d day of January, 1885, inclusive, the said bank has been insolvent, and denies that in pursuance of any intent to impair the capital of the said bank or to defraud said bank and its creditors, the said directors and the officers of said bank or either of them, made any fraudulent representations or false reports to the Comptroller of the Currency of the United States, or concealed at any time the state and condition of the accounts of said bank or its affairs, so that the same were unknown to the Comptroller of the Currency of the United States, the creditors of the said bank, or the general public; and denies that it was ever known to this defendant that there was at any time any impairment of the capital of said bank or that there was at any time any declaration or distribution of large sums of money to and amongst the shareholders of

said bank as dividends when there were no net earnings nor clear profits of the business of said bank on hand to be distributed, and denies that any such facts ever existed, and denies that the same or any other facts or circumstances pointing to or indicating such a state or condition of said bank, or such a course or practice on the part of its officers and directors, were concealed from its depositors or other creditors.

43 5. And this defendant avers that all and every of the said sums of money ordered and declared or paid by the said board of directors or by said bank to this defendant concerning which there is any charge or averment in said bill of complaint, was accepted and received by this defendant in good faith and in the ordinary course of business and without notice, knowledge or suspicion that the same or any of them were not paid out of the net or clear profits of the business of said bank and without impairing the capital thereof and without any notice, knowledge or suspicion that any of the bills receivable, owned or held by said bank, had become or were bad debts or should by law and the customs, rules and usages of banks and bankers — been charged off the books of said bank and yet continued to be carried on in the books of said bank as good paper and without any notice, knowledge or suspicion that any of the bills receivable appearing upon the books of said bank and belonging to the capital thereof as being entitled to be counted as a part of the capital, do not properly so appear upon the said books and without any notice, knowledge or suspicion of any of the misdoings, if any there were, which this defendant does not admit but expressly denies which said bill avers to have been committed by said bank, its officers or directors.

6. And this defendant, further answering, says that all sums of money received by him or the defendant John B. Dodd from said bank, as dividends, were paid to them as the holders of certain shares of the stock of said bank, upon which the original subscription was paid in full, and for which this defendant paid more than the face value thereof, and since acquiring the same, this defendant has been and still is the equitable owner of said stock and entitled to all dividends

44 paid thereon; that in the month of June, 1893, said complainant requested the defendant John B. Dodd to pay to him, said complainant, the sum of five thousand dollars, representing that upon an accounting by said complainant as receiver, an assessment on the stock of said bank of one hundred per centum had been levied by the Comptroller of the Currency under sections 5151 and 5234 of the Revised Statutes of the United States; that prior to or at the time when such request was made, no demand for an accounting for or repayment of any sum or sums of money paid out by said bank, as dividends, had been made upon this defendant, or the defendant John B. Dodd, nor had either of the defendants herein any knowledge, notice or information whatsoever, that any such claim as the complainant has set forth in his bill would be made against them or either of them; and this defendant, acting in good faith and believing that he was entitled to retain all sums of money paid as dividends on said stock, and that the capital stock of said bank

had been fully paid in, and that none thereof had been repaid as dividends or otherwise, to any of the shareholders (all of which this defendant was induced to believe and rely upon by the acts of the complainant and of the said bank and its creditors, and by the omission of the complainant to make known to this defendant his purpose to assert the claim set forth in said bill), complied with the aforesaid request of the complainant, and as the equitable owner of said stock, paid to him for the use and benefit of said bank, the sum of five thousand dollars, the amount of said assessment; and this defendant avers that in estimating the amount of the assets of said bank, for the purpose of determining the deficiency for which the said assessment was levied, the claim for the sum of $253,000,
45 stated in said bill to have been wrongfully paid to and received by the shareholders of said bank as dividends, was not nor was any part thereof reckoned as assets of said bank; and that if said claim, or so much thereof as was then collectible, had been so reckoned, such an assessment would not have been made, and that the levying and collection of said assessment, in the manner aforesaid, was and is an admission that no claim then existed against either of the defendants such as the complainant sets forth in said bill, and the complainant is estopped thereby.

7. And this defendant, further answering, says that if the complainant, the said banking association, or its creditors, had any right, claim, or cause of action against this defendant of the kind or nature or description set forth in complainant's bill (which this defendant does not admit, but expressly denies), the same was fully satisfied and discharged by the aforesaid payment of five thousand dollars by this defendant to said complainant.

8. And this defendant, further answering said bill of complaint as to so much of said bill as seeks an account and discovery, or that seeks the recovery and repayment of the several sums of money averred and stated in the said bill to have been paid to and received and accepted by this defendant at sundry times mentioned in said bill, and prior to the 1st day of July, 1890, and described in the said bill of complaint as the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh dividends, or as the sums of money so paid and received soon or next after the declaration of such dividends as set forth in said bill, this defendant says, that none of said sums of money were paid to or received by him
46 within four years before this action was brought, or within four years before the said bill of complaint was filed, or before this defendant was served with any process of this honorable court to answer said bill, or before any process whatsoever was sued out against this defendant to account for or repay said sums of money, or any of them; and that if the said plaintiff, or the said bank, or the creditors thereof, had any cause of action or suit against this defendant for or concerning any of the said matters, which this defendant does not admit but expressly denies, such cause of action or suit did not accrue or arise within four years before the said bill was filed or process issued or served on this defendant requiring him to answer the same, nor did this defendant at any time within

four years before said bill was exhibited or process sued out against him, promise or agree to come to any account or to make any satisfaction, or to pay any sum or sums of money for or by reason of any of said matters. That by far the greater part of the shareholders of the stock of said The Capital National Bank of Lincoln, Nebraska, and of the depositors thereof, reside in the said State of Nebraska, and the said complainant has filed a bill of complaint in the circuit court of the United States for the district of Nebraska against the said shareholders in that jurisdiction, stating in substance the same matters that are set forth in said bill exhibited against this defendant and setting forth and claiming that large sum- of money have been fraudulently paid by said bank to said Nebraska shareholders as dividends, but out of the capital of said bank, in the same manner and form as the similar averments in the said bill against this defendant and praying for the same equitable relief against said Nebraska shareholders as prayed for
47 in said bill against this defendant; that the statute laws of the said State of Nebraska contain a statute of limitations which bars all suits or actions of this nature unless brought within four years after the cause of action shall have accrued; that the said Nebraska shareholders have respectively received their ratable shares of all sums of money by the board of directors of said Capital National Bank of Lincoln ordered and declared and directed to be paid as dividends at or soon after the respective times when the said sums were so ordered and directed to be paid, yet the complainant and the said banking association and its creditors have through neglect and laches failed and omitted to bring any action against said Nebraska shareholders or any of them to recover or compel an accounting for any of said sums of money received by them as aforesaid until the 3d day of July, 1894, and until all claim and cause of action therefor against said Nebraska shareholders accruing prior to July 1st, 1890, became barred by the statute of limitations of said State of Nebraska, and the defendants in said Nebraska suit, or some of them, or such of them as have answered, have duly appeared by their solicitors and filed answers to the said bill against them, whereby they plead the said statute of limitations of the State of Nebraska in bar of so much of the cause of action claimed and alleged in the said bill of complaint against them as they claim did not accrue within four years before the time when said action was brought.

And this defendant pleads the several matters aforesaid in bar to so much of complainant's said demand as aforesaid as is alleged to have accrued prior to the first day of July, 1890, and prays the judgment of this honorable court thereon.

9. And this defendant, further answering said bill of com-
48 plaint as to so much of said bill as seeks an account and discovery or seeks the recovery and repayment of the said several sums of money averred and stated in the said bill to have been paid to and received and accepted by this defendant at sundry times mentioned in said bill and prior to the first day of July, 1888, and described in said bill of complaint as the first, second, third, fourth,

fifth, sixth and seventh dividends or as the sums of money so paid and received soon or next after the declaration of such dividends, as set forth in said bill, this defendant says that none of said sums of money were paid to or received by him within six years before this action was brought or within six years before the said bill of complaint was filed or before this defendant was served with any process of this honorable court to answer said bill, or before any process whatsoever was sued out against this defendant to account for or repay said sums of money or any of them, and that if the said plaintiff and the said bank or the creditors thereof have any cause of action or suit against this defendant for or concerning any of the said matters so occurring or accruing prior to July 12th, 1888, which this defendant does not admit but expressly denies, such cause of action or suit did not accrue or arise within six years before the said bill was filed or process issued or served on this defendant requiring him to answer the same; nor did this defendant at any time within six years before said bill was exhibited or process sued out against him, promise or agree in writing or otherwise to come to any account or to make any satisfaction or to pay any sum or sums of money for or by reason of any of said matters, and that if the plaintiff's alleged cause of action or any part thereof is not barred by the statute of limitations of the State of Nebraska and the laches of the complainant and of said banking association and its creditors and
49 their failure to bring suit against said Nebraska shareholders until July 3d, 1894, as above alleged, then so much of the complainant's alleged cause of action or claim as accrued prior to the first day of July, 1888, is barred by the statute of limitations of the State of New York.

And this defendant pleads the several matters aforesaid in bar to so much of complainant's said demands as aforesaid as is alleged to have accrued prior to the first day of July, 1888, and prays the judgment of this honorable court thereon.

10. And this defendant submits to this honorable court that all and every of the matters in said plaintiff's bill of complaint mentioned or complained of are matters which may be tried and determined by law, and with respect to which the said plaintiff is not entitled to any relief from a court of equity, and this defendant hopes that he will have the same benefit of this defense as if he had demurred to the said plaintiff's bill.

Wherefore the defendant prays that the said bill of complaint be dismissed, with costs.

JOHN T. LOCKMAN,
Solicitor for Defendant George G. Williams.

50 In the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln,
against
GEORGE G. WILLIAMS and JOHN B. DODD.
} In Equity.

The Answer of John B. Dodd, One of the Defendants, to the Bill of Complaint of the Above-named Complainant.

This defendant now and at all times hereafter, saving and reserving to himself all and all manner of benefit or advantage of exception or otherwise, that can or may be had to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer to, answering, says:

1. That he admits that said Capital national bank mentioned in said bill of complaint was organized as a national banking association under the laws of the United States in the manner and form and at the time in said bill set forth and averred, and that said bank from the date of said organization and until on or about the 23d day of January, 1893, was engaged in and carried on the business of
51 banking at Lincoln, Nebraska, under the laws of the United States, and that on or about said last-mentioned day said Capital National Bank of Lincoln failed, became and was insolvent, and that thereupon John D. Macfarland was appointed receiver of said bank, and thereafter resigned his said office, and that the complainant was duly appointed receiver of said bank to succeed said Macfarland, and that said complainant is now the duly appointed and qualified receiver of said bank in manner of form as in said bill set forth.

2. And further answering, this defendant denies that at different times and dates between the time and date of the organization of the said bank and the time and date of its failure as in said bill stated, the said bank met with and sustained great and heavy losses in its business, and denies that by reason of such losses, or by reason of any other cause, within less than six months after its organization and commencement of business the capital of said bank became and was greatly impaired; and denies that on or prior to the 31st day of December, 1884, or between said last-named date and the 30th day of June, 1885; or between June 30th, 1885, and December 31st, 1885; or between December 31st, 1885, and June 30th, 1886; or between June 30th, 1886, and December 31st, 1886; or between December 31st, 1886, and June 30th, 1887; or between June 30th, 1887, and December 31st, 1887; or between December 31st, 1887, and June 30th, 1888; or between June 30th, 1888, and December 31st, 1888; or between December 31st, 1888, and June 30th, 1889; or between June 30th, 1889, and December 31st, 1889; or between December 31st, 1889, and June 30th, 1890; or between June 30th, 1890, and December 31st, 1890; or between December 31st, 1890, and

June 30th, 1891; or between June 30th, 1891, and December
52 31st, 1891; or between December 31st, 1891, and June 30th, 1892, said bank met with and sustained great and heavy losses, or any losses in its business, and denies that during any of said times the said bank had no net earnings nor clear profits of the business of said bank theretofore done and transacted, and denies that during any of said times by means of losses met and sustained by the said bank in its said business, as in said bill alleged, or otherwise, the capital of said bank became or was impaired; and denies that during any of said times bills receivable owned and held by said bank and representing large amounts, or any part of its capital became or were bad debts or should by law or usage have been charged off the books of said bank, and denies that any bills receivable of the character and description in said bill alleged which had become bad debts and which should by law and usage have been charged off the books of said bank (if any such there were) continued to be carried on said books as good paper or to represent so much of the capital of said bank, and denies that during any of said times or upon any of the dates or days specified in said bill the board of directors unlawfully or fraudulently or with intent to impair the capital of the bank or to defraud the said bank or its creditors ordered or declared any dividend to be divided amongst or paid to the shareholders of said bank or to this defendant.

3. And further answering, this defendant denies that said bank has paid or delivered to him any dividends or money out of the capital of said bank and not out of net earnings nor clear profits theretofore earned or accumulated, and denies that any of the sums paid by said bank to the defendants as dividends, as set forth in said bill, was or is impressed or charged with a trust in favor
53 of said bank, and denies that any of said sums of money was or still is held by the party receiving the same in trust for the said bank to repay the same for the purpose of restoring any impairment of capital or paying the debts of said bank.

4. And further answering, this defendant denies that at the several times and dates of the order and declaration of dividends by the directors of said bank as in said bill set out and stated, and at all times since the 2d day of January, 1885, inclusive, the said bank has been insolvent, and denies that in pursuance of any intent to impair the capital of the said bank or to defraud said bank and its creditors, the said directors and the officers of said bank or either of them, made any fraudulent representations or false reports to the Comptroller of the Currency of the United States, or concealed at any time the state and condition of the accounts of said bank or its affairs, so that the same were unknown to the Comptroller of the Currency of the United States, the creditors of the said bank or the general public; and denies that it was ever known to this defendant that there was at any time any impairment of the capital of said bank or that there was at any time any declaration or distribution of large sums of money to and amongst the shareholders of said bank as dividends when there were no net earnings nor clear profits of the business of said bank on hand to be distributed, and

denies that any such facts ever existed, and denies that the same or any other facts or circumstances pointing to or indicating such a state or condition of said bank, or such a course or practice on the part of its officers and directors, were concealed from its depositors or other creditors.

5. And this defendant avers that all and every of the said sums of money ordered and declared or paid by the said board
54 of directors or by said bank to this defendant concerning which there is any charge or averment in said bill of complaint was accepted and received by this defendant in good faith and in the ordinary course of business and without notice, knowledge or suspicion that the same or any of them were not paid out of the net or clear profits of the business of said bank and without impairing the capital thereof and without any notice, knowledge or suspicion that any of the bills receivable, owned or held by said bank, had become or were bad debts or should by law and the customs, rules and usages of banks and bankers — been charged off the books of said bank and yet continued to be carried on in the books of said bank as good paper and without any notice, knowledge or suspicion that any of the bills receivable appearing upon the books of said bank and belonging to the capital thereof as being entitled to be counted as a part of the capital, do not properly so appear upon the said books and without any notice, knowledge or suspicion of any of the misdoings, if any there were, which this defendant does not admit but expressly denies, which said bill avers to have been committed by said bank, its officers or directors.

6. And this defendant, further answering, says, that all sums of money received by him or the defendant George G. Williams from said bank, as dividends, were paid to them as the holders of certain shares of the stock of said bank, upon which the original subscription was paid in full, and for which said defendant, George G. Williams, paid more than the face value thereof, and that said defendant, George G. Williams, since acquiring the same has been and still is the equitable owner of said stock and entitled to all dividends paid thereon; that in the month of June, 1893, said complainant
55 requested this defendant to pay to him, said complainant, the sum of five thousand dollars, representing that upon an accounting by said complainant, as receiver, an assessment on the stock of said bank of one hundred per centum had been levied by the Comptroller of the Currency under sections 5151 and 5234 of the Revised Statutes of the United States; that prior to or at the time when such request was made, no demand for an accounting for or repayment of any sum or sums of money paid out by said bank as dividends had been made upon this defendant, or the defendant George G. Williams, nor had either of the defendants herein any knowledge, notice or information whatsoever that any such claim as the complainant has set forth in his bill would be made against them or either of them; said defendant Williams, acting in good faith and believing that he was entitled to retain all sums of money paid as dividends on said stock, and that the capital stock

of said bank had been fully paid in and that none thereof had been repaid, as dividends or otherwise, to any of the shareholders (all of which defendant was induced to believe and rely upon by the acts of the complainant and of the said bank and its creditors, and by the omission of the complainant to make known to the defendants his purpose to assert the claim set forth in said bill), complied with the aforesaid request of the complainant, and as the equitable owner of said stock, paid to him for the use and benefit of said bank, the sum of five thousand dollars, the amount of said assessment; and this defendant avers that in estimating the amount of the assets of said bank, for the purpose of determining the deficiency for which the said assessment was levied, the claim for the sum of $253,000,
56 stated in said bill to have been wrongfully paid to and received by the shareholders of said bank as dividends, was not nor was any part thereof reckoned as assets of said bank; and that if said claim, or so much thereof as was then collectible, had been so reckoned, such an assessment would not have been made, and that the levying and collection of said assessment, in the manner aforesaid, was and is an admission that no claim then existed against the defendants such as the complainant sets forth in said bill, and the complainant is estopped thereby.

7. And this defendant, further answering, says that if the complainant, the said banking association, or its creditors, had any right, claim or cause of action against this defendant of the kind or nature or description set forth in complainant's bill (which this defendant does not admit, but expressly denies), the same was fully satisfied and discharged by the aforesaid payment of five thousand dollars by the defendant George G. Williams to the complainant.

8. And this defendant submits to this honorable court that all and every of the matters in said plaintiff's bill of complaint mentioned or complained of are matters which may be tried and determined by law, and with respect to which the said plaintiff is not entitled to any relief from a court of equity, and this defendant hopes that he will have the same benefit of this defense as if he had demurred to the said plaintiff's bill.

Wherefore the defendant prays that the said bill of complaint be dismissed with costs.

JOHN T. LOCKMAN,
Solicitor for Defendant George G. Williams.

57 Circuit Court of the United States, Southern District of New York.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska,
against
GEORGE G. WILLIAMS and JOHN B. DODD.

The Replication of the Above-named Complainant to the Separate Answer of Defendant George G. Williams.

This repliant, saving and reserving to himself, now and at — times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says that he will aver, maintain and prove this bill of complaint to be true, certain and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and maintain and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

Dated November 19th, 1894.

EDWARD WINSLOW PAIGE,
Solicitor for Complainant.

58 Circuit Court of the United States, Southern District of New York.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska,
against
GEORGE G. WILLIAMS and JOHN B. DODD.

The Replication of the Above-named Complainant to the Separate Answer of Defendant John B. Dodd.

This repliant, saving and reserving to himself, now and at — times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says that he will ever, maintain and prove his bill of complaint to be true, certain and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all

which matters and things this repliant is and will be ready to aver and maintain and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

Dated November 19th, 1894.

EDWARD WINSLOW PAIGE,
Solicitor for Complainant.

59 [Endorsed:] United States circuit court of appeals, second circuit. Kent K. Hayden, as rec'r, *vs.* George G. Williams *et al.* Certification of questions to Supreme Court. United States circuit court of appeals, second circuit. Filed Mar. 10, 1898, William Parkin, clerk.

Endorsed on cover: (Certificate.) Case No. 16,819. U. S. C. C. of appeals, 2nd circuit. Term No., 257. Kent K. Hayden, as receiver, appellant, *vs.* George G. Williams and John B. Dodd. Filed March 12th, 1898.

The complainant, by the direction of the Comptroller of the Currency, does respectfully ask the Court to advance this case for argument, not only because it consists of questions certified by the Court of Appeals, but because a large number of other actions in other jurisdictions are dependent upon the decision in this action.

EDWARD WINSLOW PAIGE,
Of Counsel.

Come now the parties and respectfully move the Court that this case be advanced for oral argument.

IN THE SUPREME COURT

OF THE UNITED STATES,

Twenty-third of May, one thousand eight hundred and ninety-eight.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

KENT K. HAYDEN, as Receiver,
Complainant-Appellant,

against

GEORGE G. WILLIAMS and JOHN B. DODD,
Defendants-Appellants.

CERTIFICATION OF QUESTIONS TO THE SUPREME COURT UNDER THE ACT OF MARCH 3, 1891.

This cause came before this Court on January 18, 1898, upon cross appeals from a decree of the Circuit Court, Southern District of New York, which decreed the payment of certain moneys to the complainant. The defendants appealed from the whole decree; the complainant because it did not give him more.

Upon the argument of said appeals certain questions of law were presented, as to which this Court desires the instructions of the Supreme Court for its proper decision. The pleadings are annexed hereto, and the facts are as follows:—

Statement of Facts.

The complainant is the Receiver of the Capital National Bank of Lincoln, Nebraska, which suspended payment in January, 1893, in a condition of hopeless insolvency. The stockholders, including the defendants, have been assessed to the full value of their respective holdings, but the money thus obtained added to the amount realized from the assets would not be sufficient even if all dividends

paid during the bank's existence were repaid to the receiver to pay 75 per cent. of the claims of the bank's creditors. This suit was brought to compel the repayment of and accounting for certain dividends paid by the bank to the defendants as holders of capital stock of the bank of the par value of $5,000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank and not out of net profits. A similar suit was brought against the stockholders resident in Nebraska, and upon appeal from a decree on demurrers was sustained by the Circuit Court of Appeals in the Eighth Circuit, defendants in that case conceding, by their demurrers, that the bank was insolvent when each dividend was paid.

The bank was organized in 1883 with a capital of $100,000, which was increased to $200,000 June 2, 1884, and to $300,000 July 21, 1886. The dividends which were paid from time to time were as follows:

DATE.	AMOUNT PAID IN DIVIDENDS.	DEFENDANT RECEIVED.
1885, Jan. 13	$15,000	$187.50
" July 14	13,000	162.50
1886, Jan. 12	16,000	200.
" July 13	14,000	175.
1887, Jan. 11	18,000	300.
" July 12	18,000	300.
1888, Jan. 10	18,o00	300.
" July 10	18,000	300.
1889, Jan. 8	18,000	300.
" July 9	18,000	300.
1890, Jan. 14	15,000	250.
" July 11	15,000	250.
1891, Jan. 13	15,000	250.
" July 13	15,000	250.
1892, Jan. 12	15,000	250.
" July 12	12,000	250.

All dividends except the last were paid to the defendant Williams, a stockholder to the amount of $5,000, from the organization of the bank; the last dividend was paid to defendant Dodd, who bought Williams' stock and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend down to and including July, 1891, was declared and paid, there were no net profits, the capital of the bank was impaired, and the dividends were paid out of capital, but the bank was still solvent.

When the dividends of January and July, 1892, were declared and paid, there were no net profits, the capital of the bank was lost and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank and believing the dividends were coming out of profits.

Questions Certified.

Upon the facts set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision is:

Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of capital, when the stockholders receiving such dividend acted in entire good faith, believing the same to be paid out of profits, and when the bank at the time such dividend was declared and paid was not insolvent?

Has a U. S. Circuit Court jurisdiction to entertain a bill in equity brought by the receiver of a national bank against stockholders to recover dividends which, it is claimed, were improperly paid, when such suit is brought against two

or more stockholders and embraces two or more dividends, and when the objection that there is an adequate remedy at law is raised by the answer?

March 9, 1898.

WM. J. WALLACE.
E. HENRY LACOMBE.
N. SHIPMAN.

SIRS,

You will take notice that in the Capitol at Washington on the twenty-third day of May, one thousand eight hundred and ninety-eight, I will move the Supreme Court of the United States that this case be advanced for oral argument.

Yours very truly,

EDWARD WINSLOW PAIGE.

To the Messrs. DE WITT.

No. 257.

Supreme Court of the United States,

Brief of Paige for Compl't.

OCTOBER TERM, 1898.

Filed April 8, 1899.

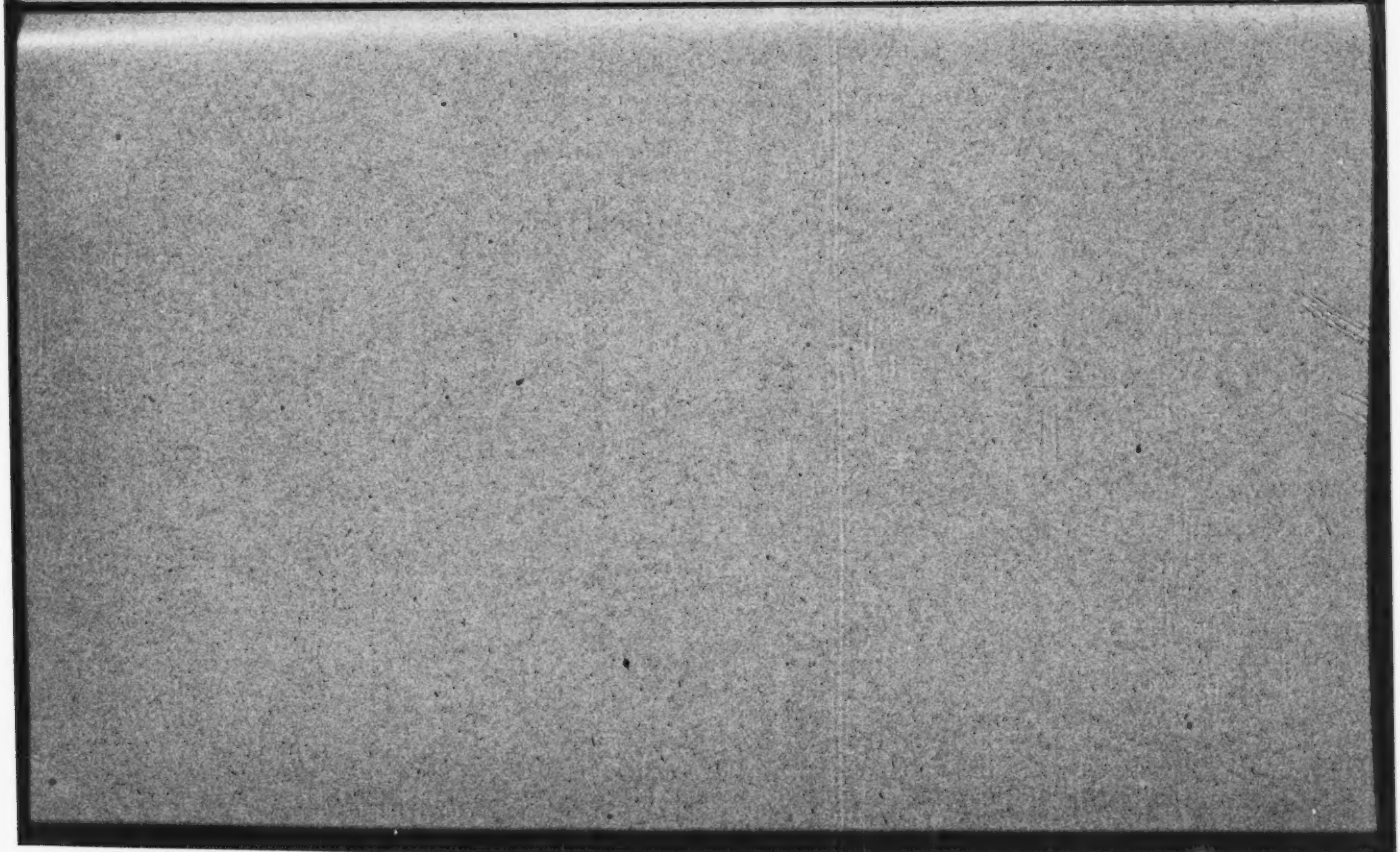
NUMBER TWO HUNDRED AND [illegible]

KENT K. HAYDEN,

against

GEORGE G. WILLIAMS AND JOHN B. DODD.

BRIEF FOR COMPLAINANT.



Supreme Court of the United States.

OCTOBER TERM, 1898.

NUMBER TWO HUNDRED AND FIFTY-SEVEN.

KENT K. HAYDEN, as receiver,

against

GEORGE G. WILLIAMS and JOHN B. DODD.

BRIEF FOR COMPLAINANT.

Abstract or Statement of Case.

FIRST HEAD: *Nature and Condition of the Action.*

The action is in equity—a bill exhibited by the receiver of the concerns of the Capital National Bank of Lincoln, Nebraska, to recover of the respondents, who are all of the stockholders of that bank resident in New York (R. 19), dividends which had been paid to them out of the capital of the bank.

In the circuit court the complainant had a decree.

On appeal to the circuit court of appeals for the second circuit that court has certified two questions.

SECOND HEAD: *The Certificate.*

(R. 1.) **"Statement of Facts.**

"The complainant is the receiver of the Capital National "Bank of Lincoln, Nebraska, which suspended payment "in January, 1893, in a condition of hopeless insol- "vency. The stockholders, including the defendants, "have been assessed to the full value of their respective "holdings, but the money thus obtained, added to the

" amount realised from the assets, would not be sufficient, " even if all dividends paid during the bank's existence " were repaid to the receiver, to pay 75% of the claims of " the bank's creditors. This suit was brought to compel " the repayment of and accounting for certain dividends " paid by the bank to the defendants, as holders of capital " stock of the bank of the par value of $5,000, on the " ground alleged in the bill, that each of said dividends " was fraudulently declared and paid out of the capital " of the bank and not out of net profits. A similar suit " was brought against the stockholders resident in Ne- " braska, and upon appeal from a decree on demurrers " was sustained by the circuit court of appeals in the " eighth circuit, defendants in that case conceding by " their demurrers that the bank was insolvent when each " dividend was paid.

" The bank was organised in 1883, with a capital of " $100,000, which was increased to $200,000 June 2, 1884, " and to $300,000 July 21, 1886. The dividends which " were paid from time to time were as follows:

" DATE.	AMOUNT PAID IN DIVIDENDS.	DEFENDANT RECEIVED.
" 1885, Jan. 13..	$15,000	$187.50
" " July 14..	13,000	162.50
" 1886, Jan. 12..	16,000	200.00
" " July 13..	14,000	175.00
" 1887, Jan. 11..	18,000	300.00
" 1887, July 12..	18,000	300.00
" 1888, Jan. 10..	18,000	300.00
" " July 10..	18,000	300.00
" 1889, Jan. 8..	18,000	300.00
" " July 9..	18,000	300.00
" 1890, Jan. 14..	15,000	250.00
" " July 11..	15,000	250.00
" 1891, Jan. 13..	15,000	250.00
" " July 13..	15,000	250.00
" 1892, Jan. 12..	15,000	250.00
" " July 12..	12,000	200.00

" All dividends except the last were paid to the de-
" fendant Williams, a stockholder to the amount of
" $5,000 from the organization of the bank. The last
" dividend was paid to defendant Dodd, who bought
" Williams' stock and had the same transferred to his
" own name December 16, 1891.

" When the dividend of Jan. 6, 1889, was declared and
" paid, and when each subsequent dividend down to and
" including July, 1891, was declared and paid, there were
" no net profits, the capital of the bank was impaired,
" and the dividends were paid out of capital, but the bank
" was still solvent.

" When the dividends of January and July, 1892, were
" declared and paid, there were no net profits, the capital
" of the bank was lost, and the bank actually insolvent.

" The defendants, neither of whom was an officer or
" director, were ignorant of the financial condition of the
" bank, and received the dividends in good faith, relying
" on the officers of the bank and believing the dividends
" were coming out of profits.

" *Questions Certified.*

" Upon the facts set forth, the questions of law, concern-
" ing which this court desires the instruction of the Su-
" preme Court for its proper decision, *is:*

" Can the receiver of a national bank recover a dividend
" paid not at all out of profits, but entirely out of capital,
" when the stockholder receiving such dividend acted in
" entire good faith, believing the same to be paid out of
" profits, and when the bank at the time such dividend
" was declared and paid was not insolvent?

" Has a U. S. circuit court jurisdiction to entertain a bill
" in equity brought by the receiver of a national bank
" against stockholders to recover dividends which it is
" claimed were improperly paid when such suit is brought
" against two or more stockholders and embraces two or

"more dividends, and when the objection that there is an "adequate remedy at law is raised by the answer?" (R. 1–3.)

Acts of Congress.

Sections 5199 and 5204 of the Revised Statutes are as follows:

"SEC. 5199. The directors of any association may, "semi-annually, declare a dividend of so much of the net "profits of the association as they shall judge expedient; "but each association shall, before the declaration of a "dividend, carry one-tenth part of its net profits of the "preceding half-year to its surplus fund until the same "shall amount to twenty per centum of its capital stock."

"SEC. 5204. No association, or any member thereof, "shall, during the time it shall continue its banking oper- "ations, withdraw, or permit to be withdrawn, either in "the form of dividends or otherwise, any portion of its "capital. If losses have at any time been sustained by "any such association, equal to or exceeding its undivided "profits then on hand, no dividend shall be made; and "no dividend shall ever be made by any association, while "it continues its banking operations, to an amount greater "than its net profits then on hand, deducting therefrom "its losses and bad debts. All debts due to any associa- "tions, on which interest is past due and unpaid for a "period of six months, unless the same are well secured, "and in process of collection, shall be considered bad "debts within the meaning of this section. But nothing "in this section shall prevent the reduction of the capital "stock of the association under section fifty-one hundred "and forty-three."

Other provisions relating to capital and dividends are as follows:

"SEC. 5140. At least fifty per centum of the capital

"stock of every association shall be paid in before it shall "be authorized to commence business; and the remainder "of the capital stock of such association shall be paid in "installments of at least ten per centum each, on the "whole amount of the capital, as frequently as one in- "stallment at the end of each successive month from the "time it shall be authorized by the Comptroller of the "Currency to commence business; and the payment of "each installment shall be certified to the Comptroller, "under oath, by the president or cashier of the associa- "tion.

"SEC. 5141. Whenever any shareholder, or his as- "signee, fails to pay any installment on the stock when "the same is required by the preceding section to be paid, "the directors of such association may sell the stock of "such delinquent shareholder at public auction, having "given three weeks public notice thereof in a newspaper "published and of general circulation in the city or "county where the association is located, or if no news- "paper is published in said city or county, then in a news- "paper published nearest thereto, to any person who will "pay the highest price therefor, to be not less than the "amount then due thereon, with the expenses of adver- "tisement and sale; and the excess, if any, shall be paid "to the delinquent shareholder. If no bidder can be "found who will pay for such stock the amount due "thereon to the association, and the cost of advertise- "ment and sale, the amount previously paid shall be for- "feited to the association, and such stock shall be sold "as the directors may order, within six months from the "time of such forfeiture, and if not sold it shall be can- "celled and deducted from the capital stock of the asso- "ciation. If any such cancellation and reduction shall "reduce the capital of the association below the minimum "of capital required by law, the capital stock shall,

"within thirty days from the date of such cancellation, "be increased to the required amount; in default of "which a receiver may be appointed, according to the pro- "visions of section fifty-two hundred and thirty-four, to "close up the business of the association."

"SEC. 5151. The shareholders of every national bank- "ing association shall be held individually responsible, "equally and ratably, and not one for another, for all con- "tracts, debts, and engagements of such association, to the "extent of the amount of their stock therein, at the par "value thereof, in addition to the amount invested in such "shares; except that shareholders of any banking associa- "tion now existing under State laws, having not less than "five millions of dollars of capital actually paid in, and a "surplus of twenty per centum on hand, both to be de- "termined by the Comptroller of the Currency, shall be "liable only to the amount invested in their shares; and "such surplus of twenty per centum shall be kept undi- "minished, and be in addition to the surplus provided for "in this Title; and if at any time there is a deficiency in "such surplus of twenty per centum, such association "shall not pay any dividends to its shareholders until the "deficiency is made good, and in case of such deficiency, "the Comptroller of the Currency may compel the associ- "ation to close its business and wind up its affairs under "the provisions of Chapter four of this Title.

"SEC. 5207. No association shall hereafter offer or re- "ceive United States notes or national bank notes as secu- "rity or as collateral security for any loan of money, or for "a consideration agree to withhold the same from use, or "offer or receive the custody or promise of custody of such "notes as security, or as collateral security, or considera- "tion for any loan of money. Any association offending "against the provisions of this section shall be deemed

"guilty of a misdemeanor, and shall be fined not more "than one thousand dollars and a further sum equal to "one-third of the money so loaned. The officer or officers "of any association who shall make any such loan shall "be liable for a further sum equal to one-quarter of the "money loaned; and any fine or penalty incurred by a "violation of this section shall be recoverable for the bene- "fit of the party bringing such suit.

"SEC. 5208. It shall be unlawful for any officer, clerk, "or agent of any national banking association to certify "any check drawn upon the association unless the person "or company drawing the check has on deposit with the "association, at the time such check is certified, an amount "of money equal to the amount specified in such check. "Any check so certified by duly authorized officers shall "be a good and valid obligation against the association; "but the act of any officer, clerk, or agent of any associa- "tion, in violation of this section, shall subject such "bank to the liabilities and proceedings on the part of "the Comptroller as provided for in section fifty-two hun- "dred and thirty-four.

"SEC. 5209. Every president, director, cashier, teller, "clerk, or agent of any association, who embezzles, "abstracts, or wilfully misapplies any of the moneys, "funds, or credits of the association; or who, without "authority from the directors, issues or puts in circula- "tion any of the notes of the association; or who, with- "out such authority, issues or puts forth any certificate "of deposit, draws any order or bill of exchange, makes "any acceptance, assigns any note, bond, draft, bill of "exchange, mortgage, judgment, or decree; or who makes "any false entry in any book, report, or statement of the "association, with intent, in either case, to injure or defraud "the association or any other company, body politic or

"corporate, or any individual person, or to deceive any "officer of the association, or any agent appointed to ex- "amine the affairs of any such association; and every "person who with like intent aids or abets any officer, "clerk, or agent in any violation of this action, shall be "deemed guilty of a misdemeanor, and shall be im- "prisoned not less than five years nor more than ten."

BRIEF OF THE ARGUMENT.

I.

The capital of a national bank is a trust fund for the security of the creditors and can be followed into the hands of any volunteer.

1. *This is settled by the adjudged cases:*

In *Curran* v. *Arkansas*, 15 How. 304, the Court, speaking by Mr. Justice Curtis, said:

(p. 307.) "The plaintiff is a creditor of an insolvent "banking corporation. The assets of such a corporation "are a fund for the payment of its debts. If they are "held by the corporation itself, and so invested as to be "subject to legal process, they may be levied on by such "process. *If they have been distributed among stock-* "*holders*, or gone into the hands of others than *bona fide* "creditors or purchasers, *leaving debts of the corporation* "*unpaid, such holders take the property charged with* "*the trust in favor of creditors, which a court of equity* "*will enforce, and compel the application of the prop-* "*erty to the satisfaction of their debts.*

"This has been often decided, and rests upon plain "principles. In 2 Story's Eq. Jur. § 1252, it is said, "'Perhaps, to this same head of implied trusts upon pre-

" ' sumed intention, (although it might equally well be
" ' deemed to fall under the head of implied trusts by
" ' operation of law,) we may refer that class of cases
" ' where the stock and other property of private corpora-
" ' tions is deemed a trust fund for the payment of the
" ' debts of the corporation; so that the creditors have a
" ' lien, or right of priority of payment on it, in prefer-
" ' ence to any of the stockholders of the corporation.'
" Thus, for example: ' *The capital stock of an incorpor-*
" ' *ated bank is deemed a trust fund for all the debts of*
" ' *the corporation: and no stockholder can entitle him-*
" ' *self to any dividend or share of such capital stock,*
" ' *until all the debts are paid, and if the capital stock*
" ' *should be divided, leaving any debts unpaid, every*
" ' *stockholder, receiving his share of the capital stock,*
" ' *would, in equity, be held liable* pro rata *to contribute*
" ' *to the discharge of such debts out of the fund in his*
" ' *own hands.*' In conformity with this is the doctrine
" held by this court in Mumma *v.* The Potomac Com-
" pany, 8 Peters, 281.

" The cases of Wood *v.* Dummer, 3 Mason, 308;
" Wright *v.* Petrie, 1 Smedes & Marsh. 319; Nevitt *v.*
" Bank of Port Gibson, 6 Id., 513; Hightower *v.* Thorn-
" ton et al. 8 Georgia R. 493; Nathan *v.* Whitlock, 3
" Edwards, C. R. 215, affirmed by the chancellor, (9
" Paige, 152,) contain elaborate examinations of this
" doctrine, and it has been affirmed and applied in many
" other cases";

And at page 311, " Whatever technical difficulties exist
" in maintaining an action at law by or against a corpora-
" tion after its charter has been repealed, *in the appre-*
" *hension of a court of equity, there is no difficulty in a*
" *creditor following the property of the corporation into*
" *the hands of anyone not a* bona fide *creditor or pur-*
" *chaser, and asserting his lien thereon, and obtaining*

"*satisfaction of his just debt out of that fund specif-*
"*ically set apart for its payment when the debt was con-*
"*tracted, and charged with a trust for all the creditors*
"*when in the hands of the corporation;* which trust the
"repeal of the charter does not destroy. Chancellor Kent,
"in 2 Com. 307, n., says, 'The rule of the common law
"'has in fact become obsolete. It has never been applied
"'to insolvent or dissolved moneyed corporations in Eng-
"'land. The sound doctrine now is, as shown by statutes
"'and judicial decisions, that the capital and debts of bank-
"'ing and other moneyed corporations, constitute a trust
"'fund and pledge for the payment of creditors and stock-
"'holders, and a court of equity will lay hold of the fund
"'and see that it be duly collected and applied.' The
"case of Hightower *v.* Thornton, 8 Georgia R. 491, and
"other cases before referred to in this opinion, are in con-
"formity with this doctrine";

And at page 315, "Whatever losses a bank sustains,
"are losses of the capital paid in by its stockholders;
"that is the only fund it has to lose. When it has be-
"come insolvent, it has lost all that fund, and has noth-
"ing belonging to its stockholders. In some sense a bank
"may be said to be indebted to its stockholders for the
"capital they have paid in. With the leave of the State,
"they have a right to withdraw it, *after all debts are*
"*paid*, and if the State is itself the sole stockholder, it
"may withdraw its capital while any of it shall remain.
"But, from the very nature of things, it cannot withdraw
"capital from an insolvent bank, because it has none of
"their capital remaining. When insolvent, its assets
"belong solely to its creditors."

Italics mine.

In *Railroad Company* v. *Howard*, 7 *Wall*, 392, the Court, speaking by Mr. Justice Clifford, said (p. 410):

"Moneys derived from the sale and transfer of the

" franchises and capital stock of an incorporated company " are assets of the corporation, *and as such constitute a* " *fund for the payment of its debts*, and if held by the " corporation itself, and so invested as to be subject to " legal process, the fund may be levied on by such pro- " cess; *but if the fund has been distributed among the* " *stockholders*, or passed into the hands of other than " *bona-fide* creditors or purchasers, *leaving any debts of* " *the corporation unpaid, the established rule in equity* " *is that such holders take the fund charged with the* " *trust in favor of creditors, which a court of equity* " *will enforce, and compel the application of the same* " *to the satisfaction of their debts.*—Story's Equity " Jurisprudence (9th ed.), § 1252; Mumma *v.* Potomac " Company, 8 Peters, 286; Wood *v.* Dummer, 3 Mason, " 308; Vose *v.* Grant, 15 Massachusetts, 522; Spear *v.* " Grant, 16 Massachusetts, 14; Curran *v.* Arkansas, 15 " Howard, 307.

" Regarded as the trustee of the corporate fund, the " corporation is bound to administer the same in good " faith for the benefit of creditors and stockholders, and " all others interested in its pecuniary affairs, and *any-* " *one receiving any portion of the fund by volun-* " *tary transfer, or without consideration, may be* " *compelled to account to those for whose use the fund* " *is held. Creditors are preferred to stockholders on* " *account of* THE PECULIAR TRUST *in their favor, and* " *because the latter, as constituent members of the cor-* " *porate body, are regarded as sustaining, in that aspect,* " *the same relation to the former as that sustained by the* " *corporation.*"

This language was repeated by the Court in *Scammon* v. *Kimball*, 92 U. S., 362, 367.

In *Sanger* v. *Hoag*, 17 Wall, 610, the Court, speaking by Mr Justice Miller, said (p. 620):

" Though it be a doctrine of modern date, we think it " now well established that the capital stock of a corpora- " tion, especially its unpaid subscriptions, is a trust fund " for the benefit of the general creditors of the corpora- " tion."

In *Barings* v. *Dabney*, 19 Wall, 1, the Court, speaking by Mr. Justice Bradley, said (p. 9):

" It was expressly decided, in *Curran* v. *The State of* " *Arkansas*, 15 Howard, 304, *that if the capital of a State* " *bank, like the one in question, be withdrawn by the* " *State*, either for the payment of its own debts or for " deposit in the State Treasury, *it is a violation of the* " *pledges by which the capital of the bank*, though de- " rived from State resources or State obligations, *was set* " *apart and appropriated as the basis of the inde-* " *pendent credit of the bank;* and that a law passed to " effect such a withdrawal or misappropriation impaired " the validity of the contracts held by the creditors of the " bank."

In *Sanger* v. *Upton*, 91 U. S., 56, the Court, speaking by Mr. Justice Swayne, said (p. 60):

" The capital stock of an incorporated company is a " fund set apart for the payment of its debts. It is a " substitute for the personal liability which subsists in " private co-partnerships. When debts are incurred, a " contract arises with the creditors that it shall not be " withdrawn or applied, otherwise than upon their de- " mands, until such demands are satisfied. *The creditors* " *have a lien upon it in equity. If diverted, they may* " *follow it as far as it can be traced, and subject it to* " *the payment of their claims*, except as against holders " who have taken it *bona fide* for a valuable consideration " and without notice. *It is publicly pledged to those* " *who deal with the corporation for their security.*"

In *Finn* v. *Brown*, 142 U. S., 56, the Court sustained the recovery of a dividend, but in that case the bank was insolvent when the dividend was declared and paid, and the holding therefore does not come within the question certified.

In *Vose* v. *Grant*, 15 Mass. 505, and *Spear* v. *Grant*, 16 Mass. 9, cited by Mr. Justice Clifford in *Railroad Company* v. *Howard*, 7 Wall. 392, 410, the bank was not insolvent.

In *Bartlett* v. *Drew*, 57 N. Y., 587, and *Hastings* v. *Drew*, 76 N. Y., 9, the corporation, which was a steamboat company, sold three steamboats and divided the proceeds among its stockholders. It was not insolvent. On the contrary the complaint alleged that it, until "the distribution of its capital stock and assets as "hereinafter set forth, was possessed of and owned capi- "tal stock and assets, more than sufficient for the pay- "ment of all its debts and liabilities" (Appeal Book, fol. 10, Ct. App. Cases, Bar Association, Vol. 5 of 1874).

And the court in *Bartlett* v. *Drew*, 57 N. Y., 587, speaking by Mr. Commissioner Reynolds, said (p. 589):

"The circumstance that the debtor is a foreign corpo- "ration, or that the defendant, Drew, was its president, "director or stockholder, is quite immaterial, if it be "found that Drew has any of the assets or property of "the corporation which ought to be applied in payment "of its debts. It is equally immaterial, whether he got it "by fair agreement with his associates, or by any wrong- "ful act. If the law dooms it to the payment of the "debts of the corporation, it may be taken in some form "by the creditor. It is a very plain proposition that the "the stock and property of every corporation is to be re- "garded as a trust fund for the payment of its debts, and "its creditors have a lien and the right to priority of

" payment over any stockholder, (2 Story Eq. Jur., § " 1252.)"

And at page 590: "As before suggested, it does not " matter how it came to the possession of the defendant, " Drew. It is enough that he had it, and it was so much " of the assets of the corporation as ought to be devoted " to the payment of the debts of the company, and " his claim as a stockholder could not prevail over the " creditor's prior right. (*Curran* v. *State of Arkansas*, " 15 How [U. S.,] 305; *Tinkham* v. *Borst*, 31 Barb., 407, " 412; 2 Kent Com., 307; 2 Story's Eq. Jur., §1252)."

Hayden v. *Thompson*, 36 U. S. App., 361. This is the case decided by the court of appeals of the eighth circuit, spoken of in the certificate (R. 1).

Of course, this is quite different from *Hollins* v. *Brierfield Coal and Iron Company*, 150 U. S., 371. The receiver has all the powers and all the rights of all the creditors put together, if they were all here, each with a judgment and execution returned unsatisfied and a creditor's bill filed. If *Hollins*, in that case, had had the sort of lien necessary for that sort of action upon *any* assets, not capital necessarily, the decision would have been otherwise. In this case, the question certified assumes that complainant had the sort of interest necessary for this sort of action in *assets* though not in *capital*, and *Finn* vs. *Brown*, 142 U. S., 156, so holds.

There is not anything in the *Hollins case* which is inconsistent with this. In that case the Court, speaking by Mr. Justice Brewer, said (150 U. S., 371, 383): "With " reference to the suggestion in this last paragraph, it " may be observed that the court does not attempt to de- " termine who are proper parties to maintain a suit for " the administration of the assets of an insolvent corpora- " tion. All that it decides is, that when a court of equity " does take into its possession the assets of an insolvent

"corporation, it will administer them on the theory that "they in equity belong to the creditors and stockholders "rather than to the corporation itself. In other words, "and that is the idea which underlies all these expres- "sions in reference to 'trust' in connection with the "property of a corporation, the corporation is an entity, "distinct from its stockholders as from its creditors. "Solvent, it holds its property as an individual holds his, "free from the touch of a creditor who has acquired no "lien; free also from the touch of a stockholder who, "though equitably interested in, has no legal right to, "the property. Becoming insolvent, the equitable in- "terest of the stockholders in the property, together with "their conditional liability to the creditors, place the "property in a condition of trust, first, for the creditors, "and then for the stockholders. Whatever of trust there "is arises from the peculiar and diverse equitable rights "of the stockholders as against the corporation in its "prosperity and their conditional liability to its credi- "tors. It is rather a trust in the administration of the "assets after possession by a court of equity than a trust "attaching to the property as such, for the direct benefit "of either creditor or stockholder.

"Again, in the case of the *Wabash, St. Louis & Pacific* "*Railway* v. *Ham*, 114 U. S. 587, it appeared that four "railway corporations, owing debts, were consolidated "under authority of law, and, by the terms of the con- "solidation agreement, the new corporation was to protect "the debts of the old. Subsequently, the new corpora- "tion executed a mortgage on all its property, and in a "contest between the mortgagees and the unsecured cred- "itors of one of the constituent companies, the court held "that the lien of the mortgagees was prior. In respect "to this, Mr. Justice Gray (p. 594) thus stated the law: "'It was contended that the property of the Toledo and

" ' Wabash Railway Company was a trust fund for all its
" ' creditors, and that upon the consolidation, the Toledo,
" ' Wabash and Western Railway Company took the
" ' property of the Toledo and Wabash Railway Company
" ' charged with the payment of all its debts. The prop-
" ' erty of a corporation is doubtless a trust fund for the
" ' payment of its debts, in the sense, that when a corpor-
" ' ation is lawfully dissolved and all its business wound
" ' up, or when it is insolvent, all its creditors are enti-
" ' tled in equity to have their debts paid out of the cor-
" ' porate property before any distribution thereof among
" ' the stockholders. It is also true, in the case of a cor-
" ' poration, as in that of a natural person, that any con-
" ' veyance of property of the debtor, without authority
" ' of law, and in fraud of existing creditors, is void as
" ' against them.'

" The case of *Fogg* v. *Blair*, 133 U. S. 534, 541, pre-
" sented a similar question, and this court by Mr. Justice
" Field, observed: ' We do not question the general doc-
" ' trine invoked by the appellant, that the property of a
" ' railroad company is a trust fund for the payment of its
" ' debts, but do not perceive any place for its application
" ' here. That doctrine only means that the property
" ' must first be appropriated to the payment of the debts
" ' of the company before any portion of it can be distrib-
" ' uted to the stockholders; it does not mean that the
" ' property is so affected by the indebtedness of the com-
" ' pany that it cannot be sold, transferred or mortgaged
" ' to *bona fide* purchasers for a valuable consideration,
" ' except subject to the liability of being appropriated
" ' to pay that indebtedness. Such a doctrine has no
" ' existence.'

" In the case of *Hawkins* v. *Glenn*, 131 U. S., 319, 332,
" which was an action brought by the trustee of a cor-
" poration against certain of its stockholders to recover

" unpaid subscriptions, and in which the defence of the " statute of limitations was pleaded, Chief Justice Fuller " referred to this matter in these words: 'Unpaid sub- " 'scriptions are assets, but have frequently been treated " 'by courts of equity as if impressed with a trust *sub* " '*modo*, upon the view that, the corporation being insol- " 'vent, the existence of creditors subjects these liabilities " 'to the rules applicable to funds to be accounted for as " 'held in trust, and that, therefore, statutes of limitation " 'do not commence to run in respect to them until the " 'retention of the money has become adverse by a refusal " 'to pay upon due requisition.'

" These cases negative the idea of any direct trust or " lien attaching to the property of a corporation in favor " of its creditors, and at the same time are entirely con- " sistent with those cases in which the assets of a cor- " poration are spoken of as a trust fund, using the term " in the sense that we have said it was used.

" The same idea of equitable lien and trust exists to " some extent in the case of partnership property. " Whenever, a partnership becoming insolvent, a court of " equity takes possession of its property, it recognizes the " fact that in equity the partnership creditors have a right " to payment out of those funds in preference to in- " dividual creditors, as well as superior to any claims of " the partners themselves. And the partnership property " is, therefore, sometimes said, not inaptly, to be held in " trust for the partnership creditors, or that they have an " equitable lien on such property. Yet, all that is meant " by such expressions is the existence of an equitable " right which will be enforced whenever a court of equity, " at the instance of a proper party and in a proper pro- " ceeding, has taken possession of the assets. It is never " understood that there is a specific lien, or a direct trust.

" A party may deal with a corporation in respect to its

"property in the same manner as with an individual "owner, and with no greater danger of being held to have "received into his possession property burdened with a "trust or lien. The officers of a corporation act in a "fiduciary capacity in respect to its property in their "hands, and may be called to an account for fraud or "sometimes even mere mismanagement in respect thereto; "but as between itself and its creditors the corporation is "simply a debtor, and does not hold its property in trust, "or subject to a lien in their favor, in any other sense "than does an individual debtor. That is certainly the "general rule, and if there be any exceptions thereto they "are not presented by any of the facts in this case. "Neither the insolvency of the corporation, nor the exe-"cution of an illegal trust deed, nor the failure to collect "in full all stock subscriptions, nor, all together, gave to "these simple contract creditors any lien upon the prop-"erty of the corporation, nor charged any direct trust "thereon."

There is this difference between a bank and a human being. The latter has no stockholders. He is a single, simple, being. If he has any money he keeps it as he pleases; if he do so choose, partly in his right-hand pocket, partly in his left-hand pocket, partly in his drawer, partly in his safe, partly in his bank, and partly, it may be, he buries in the ground. But a bank has stockholders —and if its directors commit any of its money to its stockholders, that money being the money of the bank and not of the stockholders, why are those stockholders any other than the pockets, the drawer, the safe, the bank and the hiding-place of the human being?

Nobody has ever pretended that the "trust" or the "lien" is good against anybody but a volunteer.

I do, however, claim this for the "trust," which could not be claimed against an human being. An human being, being solvent, *can give away his property*. I submit that a bank *cannot give* away any of its property, though it be perfectly solvent and though the giving away of the property does not make it insolvent. To that extent, I submit, the "trust" is *good*.

2. *The same result will be reached by reasoning from the rule that a dividend paid*, when the bank is insolvent, *can be recovered back*.

In *Finn* v. *Brown*, 142 U. S. 56, there were transferred to defendant, who had been a director and the vice-president of the bank, for about a month, fifty shares of stock from the stock of the president, and a dividend of twenty-five per cent. was made and $1,250 was put to the credit of the defendant as the owner of that stock. The defendant testified, that as soon as he was told of the transactions he repudiated the whole of them and gave a cheque for the $1,250, *not to the bank but to the president, and that he knew nothing about the condition of the bank and so far from thinking it to be insolvent he supposed it to be in flourishing circumstances*. The Court evidently believed him, as will appear from what is to be quoted from the opinion. At any rate what he testified to must have been taken as true, as the trial court refused to let him go to the jury. The defendant really owned twenty shares upon which he received $500, making a dividend of $1,750 in all. The Court, speaking by Mr. Justice Blatchford, said (p. 70): "In regard to the dividend of 25 per cent. "it was clearly fraudulent and unlawful. The defendant "did not get rid of his liability for the $1,250 by draw- "ing his check for that sum in favor of DeWalt (the presi-

"dent) individually and handing the same to DeWalt. "The money belonged to the bank, and ought to have been "restored to the bank. The dividend being unlawful, and "the $1,250 having been paid to the defendant by the "bank, by being transferred to his credit by the bank on "its books, it was not for him to take the place of the "bank and to pay the money to DeWalt."

And at page 71: "The jury would not have been justi- "fied in holding the defendant not liable for the assess- "ment on the 50 shares or for the $1,750 dividend. The "dividend was undoubtedly fraudulent, and the records of "the bank were falsified in showing that the defendant "was present at the meeting at which the dividend was "declared. It was declared, probably, by DeWalt him- "self alone, for the purpose of showing a fictitious pros- "perity and of concealing from the public and the direc- "tors the real condition of the affairs of the bank. The "defendant had no previous connection with banking "business, and was deceived by DeWalt. But all this "cannot relieve him from liability."

The Court thus held that a dividend declared and paid when the bank was insolvent could be recovered back. In that case, of course, the dividend was not paid out of capital, because there was not any capital to pay it out of. The capital was all gone.

But if the assets of a bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent. The mere fact that the value of the assets of a corporation has sunk below the amount of its debts, although as yet unknown to anybody cannot possibly *make a new contract* between the corporation and its *then* creditors.

It will be observed that the question certified does not refer to a time fixed by an *act* of insolvency, but to a time fixed by the *fact* of insolvency:—The court of appeals

evidently being of the opinion that the *mere fact* of insolvency made it possible to recover back a dividend declared and paid when the bank was in that condition.

But if the assets of the bank had not already been impressed with a trust in favor of the creditors, by what act of what parties, or by the meeting of whose minds, or by what statute, or by what rule of presumed intention, *did they become so at the instant when the value of the assets fell one cent below the amount of the debts:* that condition of things being unknown to anybody at the time, but discovered afterwards?

Of course there was never any such act of any parties—no minds ever met on any such proposition—no statute ever existed so providing and there never was any such rule of presumed intention, *and it follows* that if the assets of a bank are impressed with a trust in favor of its creditors where it is insolvent, *they must have* ALWAYS *been impressed with such a trust.*

II.

The Statutes of the United States make the payment of a dividend out of capital illegal and *ultra vires* of the corporation. Money thus paid, therefore, still remains the property of the corporation and can be followed into the hands of any volunteer.

I. *The Statutes of the United States make the payment of a dividend out of capital illegal and* ultra vires.

"When Congress made provision for a system of national "banks, it undertook at the same time to make provision

"for the security of those dealing with such banks. By "requiring the deposit with the Treasurer of the United "States of U. S. Registered bonds which may at the proper "time be sold under the direction of the Comptroller of the "Currency a special fund was provided for the redemption "of the circulating notes of the bank. To provide for any "deficit in the event of insolvency each shareholder was "required to respond to the full extent of his holding, in "addition to the full-paid par value of his shares, whenever "an assessment to pay the debts of the association might "become necessary. (Sec. 5151, 5234.) Congress further "provided, and provided most carefully, for the preserva- "tion of the capital of the bank intact. The amount of the "nominal capital of each bank is of course known to or easily "ascertainable by whomever deals with it as depositor "or otherwise. If the nominal capital is at all times repre- "sented by free assets in the bank's hands, there is reason- "able assurance to those dealing or about to deal with the "bank that they may do so with safety. That such a fund "should be created, and kept at all times intact as a reserve "fund upon the continued existence of which depositors "and persons dealing with the bank could rely, was ex- "pressly, and in the most careful and peremptory language "required by the statute. The provisions for the creation "and preservation of this fund are found in the following "sections. Sections 5140 and 5141 provide for payment in "of the capital, fifty per cent. before the association shall "be authorized to commence business, and the residue, by "instalments within six months thereafter, the directors "being authorized to sell the shares of any stockholder who "may be delinquent in paying his instalment. Section 5205 "provides that every association which shall have failed to "pay up its capital stock, as required by law, and every as- "sociation whose capital stock shall have become impaired "by losses or otherwise, shall within three months after re-

"ceiving notice thereof from the Comptroller of the Cur-
"rency pay the deficiency in the capital stock by assessment
"upon the shareholders, and if this is not done within the
"time limited the association must go into liquidation, or
"a receiver be appointed. With the greatest care and pru-
"dence it is not possible always to avoid losses, which may
"be so large as to sweep away part of the capital, but by
"the provisions of the section last-quoted and a system of
"reports and examinations designed to disclose the true
"condition of the bank to the officials of the Treasury De-
"partment, Congress sought to minimize the results of such
"misfortune by requiring the bank promptly to make good
"its depleted fund or to cease doing business. It may be
"noted that the payment of assessment under Sec. 5205 to
"make good impaired capital and so enable the bank to
"continue doing business does not relieve the shareholder
"from the double liability of Sec. 5151. But the capital of
"a bank may be depleted otherwise than by losses; it may
"be distributed in the form of dividends to the shareholders.
"To this method of depletion of the fund known as 'cap-
"ital,' Congress opposed the prohibition of Section 5204:
"'No association, or any member thereof, shall, during
"'the time it shall continue its banking operations, with-
"'draw, or permit to be withdrawn, either in the form of
"'dividends or otherwise, any portion of its capital.'
"Nothing is said as to 'intent'; the sentence is a flat
"prohibition of the act of withdrawal. The language in
"which this prohibition is cast is the most drastic used in
"the whole Title. In one section (5209) certain acts are
"declared misdemeanors when done by 'president, di-
"'rector, cashier, teller, clerk or agent of such associa-
"'tion'; in another section (5208) it is declared unlawful
"for 'any officer, clerk or agent' to do certain acts; in
"still another section (5207) 'any association offending
"'against the provisions' of the section is declared guilty

"of a misdemeanor and fined, and 'the officer or officers' "so offending are required to pay an additional fine. In "most of the sections containing a prohibition the language "used is 'no association shall'; a form of words which lays "the inhibition solely upon the association or its officers "and does not personally disqualify the persons dealing "with the association or with such officer. Thompson *v.* "St. Nicholas National Bank, 146 U. S. 251.

"But by section 5204 Congress has reached over and "beyond the association and its officers and has laid upon "the individual shareholder (although not a director, or in "a position to know the bank's condition) a prohibition as "peremptory and unqualified as that laid upon the bank "itself. '*No* association, or any *member thereof*, *shall* "'*during the time it shall continue its banking opera-* "'*tions*, *withdraw*, or permit to be withdrawn, either *in* "'*the form of dividends* or otherwise, *any part of its* "'*capital stock.*' The use of this particular form of "words is most suggestive, and the language used is cer- "tainly unambiguous. When the defendants, therefore, "received these dividends out of capital, they withdrew the "moneys so received, from the special fund which under "the statute was to be created and preserved intact as a "reserve to secure those dealing with the association against "loss in the event of failure; and they did this when the "statute expressly forbade *them* to do so. They have "depleted the fund which it was made *their* duty (as "well as that of the officers and directors) not to deplete: "they have received money belonging to the bank to which "they had no right and for which they have given no con- "sideration, and since that money was pledged for a specific "purpose, viz: the maintenance of the capital intact as a "fund for the protection of depositors and other creditors, "future as well as present, its diversion into the hands of "defendants was a fraud upon those for whose benefit such

"fund was created. The bank would have had as good a "right to recover from its shareholder money thus received "without consideration, as it would to recover from its "president for overpayments of salary, and to that right of "action the Receiver has succeeded. It is argued that by "such a construction of Sec. 5204 the stockholder in a "national bank is exposed to great hardship; that he may "go on for years receiving dividends, ignorant of the mal-"versations of the bank's officers, of the supine negligence "of its board of directors, of the incompetency or careless-"ness of the examiner, and then suddenly find himself "called upon to repay what he honestly supposed he was "entitled to. That seems not to be a sufficient reason for "construing the section otherwise than in conformity to its "express terms. The hardship imposed is no greater than "is that imposed by the double liability section (5151). "Congress was apparently concerned with the question of "security to those dealing with the bank, rather than with "the hardships which might result to the shareholders "who were so unfortunate as to confide the conduct of their "bank to officers and directors who might turn out to be "incompetent or dishonest."

The above is taken from Judge Lacombe's opinion. All the sections to which he refers are printed in full above.

Section 5204 which provides, as above said by Judge Lacombe, that—"No association, or any member thereof, "shall, during the time it shall continue its banking "operations, withdraw, or permit to be withdrawn, either "in the form of dividends or otherwise, any portion of "its capital," makes a dividend paid out of capital *ultra vires*, not of the board of directors merely, *but of the whole association*,—

California Bank v. *Kennedy*, 167 U. S. 362, and makes it also *illegal*.

Trevor v. *Whitworth*, 12 App. Cas. 409.

II. *The making of the dividends being both* ultra vires *of the association and illegal and the* taking *of them being illegal also, they can be recovered back.*

The money was always and still is the property of the association and the defendants have not the slightest interest in it. As was said in *Bartlett* v. *Drew*, 57 N. Y., 587, already cited: (p. 590) "As before suggested it does "not matter how it came to the possession of the defend- "ant Drew. *It is enough that he had it.*"

There are numerous cases upon this subject in England arising under the Companies' Act. They vary a good deal, because the powers of a company under the Companies' Act are defined, not by the act, but by the "memorandum of association," but they are uniform in this—that a dividend made out of capital is *ultra vires* and "invalid" and can be recovered back.

They differ as to what *is* "capital."

In *Stringer's Case*, LR4Ch475 (1869), both of the Lords Justices of the court of appeal said that a dividend paid out of capital would be ordered to be paid back in the winding up (pp. 489, 494). In that case however the court held that the dividend had *not* been paid out of capital.

Holmes v. *Newcastle-upon-Tyne Abattoir Company*, 1ChD628 (1875). In this case a shareholder compelled the other shareholders to repay their dividends *to the company, it being a solvent and going concern.*

Guinness v. *Land Corporation of Ireland*, 22ChD 349 (1882), where Mr. Justice Chitty after quoting Lord Hatherly's judgment in *Macdougall* v. *Jersey Imperial Hotel Company*, 2 H. & M., 528, 535, said: (p. 361.) "That second proposition appears to involve this, that if "the dividends are paid out of capital to the shareholders, "in the winding up *the persons who receive it* would be "liable to repay. That portion of the judgment was cited "with approval by Mr. Justice Fry in the case of *In re*

" *Alexandra Palace Company*, 21 Ch. D., 149, where he " says that in his view what I have just read lays down " the law with perfect precision, and he goes on to say " (*Ibid.* 160), 'I think no subterfuge by which it is at- " 'tempted to return capital to shareholders, and thereby " 'to diminish their liability, ought to be countenanced " 'for one moment by this Court.'"

In the same case on appeal the Lord Justice Cotton said: 22ChD375. "In my opinion it also follows " that what is described in the memorandum as the " capital cannot be diverted from the objects of the society. " It is, of course, liable to be spent or lost in carrying on " the business of the company, *but no part of it can* " *be returned to a member so as to take away from the* " *fund to which the creditors have a right to look as that* " *out of which they are to be paid. In former days pro-* " *ceedings could be taken against members of a com-* " *pany*, but under the present law a creditor has no rem- " edy except execution against the goods of the company, " or winding-up proceedings. If a winding-up order is " made *each shareholder is liable to contribute* the amount " not paid upon his shares, including *what if anything he* " *has had returned.*" And also the judgment of the Lord Justice Bowen (p. 380).

Gooch v. *London Banking Association*, 32ChD41,47.

In re Oxford Benefit Building and Investment Society, 35ChD502. In this case the directors were held liable for paying dividends out of capital, with a reservation of their rights to recover from the shareholders. (p. 517).

See *In re Sharpe*, [1892] 1Ch154.

Ooregum Gold Mining Company v. *Roper*[1892]AC125.

The language of Lord Herschell, in *Trevor* v. *Whitworth*, 12 App. Cas. 409—where he says at p. 415 " what is the " meaning of the distinction thus drawn between a com- " pany without limit on the liability of its members and

" a company where the liability is limited, *but*, in the " latter case *to assure to those dealing with the company* " *that the whole of the subscribed capital*, unless dimin- " ished by expenditure upon the objects defined by the " memorandum, *shall remain available for the discharge* " *of its liabilities?* The capital may, no doubt be dimin- " ished by expenditure upon and reasonably incidental " to all the objects specified. A part of it may be lost in " carrying on the business operations authorised. Of this " all persons trusting the company are aware, and take " the risk. *But I think they have a right to rely, and* " *were intended by the Legislature to have a right to* " *rely, on the capital remaining undiminished* by any " expenditure outside these limits, or *by the return of* " *any part of it to the shareholders.*"

Italics mine.

runs through all the later cases.

Of the cases cited by the defendant's counsel *Stringer's Case*, LR4Ch175 has already been referred to.

In *Rance's Case*, LR6Ch104 a director was ordered to repay a dividend which had been paid to him out of capital. It did not appear that the company was then insolvent.

Re Denham 25ChD752, if it turns on other than section 165 of the Companies Act, 1862, is contrary to Mr. Justice Chitty's later decision in *Guinness* vs. *Land Corporation of Ireland*, 22ChD349, already quoted.

The argument is pressed that it is a great hardship to make a stockholder pay back dividends which he received in the belief that they had been earned. But it would be a greater hardship upon the creditor to let the stockholder keep them. The stockholder can examine the bank when ever he pleases. If he finds the directors are paying divi-

dends out of capital, he can vote them out, or if he cannot get enough other stockholders to join with him he can apply to the comptroller of the currency. He need not take his dividend until he has ascertained these things. What is more, the stockholders originally chose those who have made the dividends out of capital.

The creditor has no such rights, and, he had no voice in the choice of the managers. All he can do is to rely upon the statute that the stockholder shall not "withdraw," "either in the form of dividends or other-"wise, any portion of its capital."

III.

Equity has jurisdiction.

In *Finn* v. *Brown*, 142 U. S. 56, a judgment at law upon a verdict was sustained by the Court, but the question was not raised and was therefore waived.

On the other hand in *Vose* v. *Grant*, 15 Mass. 505, the court, after saying (p. 521) that the creditors ought to be paid out of the funds which the stockholders had with drawn from the bank, held that it could not be effected at law, and, as the Supreme Judicial Court of Massachusetts had no equity powers, it could give no relief: Mr. Justice Jackson saying (p. 522): "*This is one of the numerous cases, which are constantly occurring, which show the necessity of a court of chancery for the complete distribution of justice among the people.*

Italics in the original.

Mr. Justice Story, in his treatise on Equity Jurisprudence, following what has been already quoted, viz.: "And if the capital stock should be divided, leaving any "debts unpaid, every stockholder receiving his share of

" the capital stock would in equity be held liable *pro* " *rata* to contribute to the discharge of such debts out of " the fund in his hands," said (§ 1252): " *This, however,* " *is a remedy which can be obtained in equity only;* for " a Court of Common Law is incapable of administering " any just relief, since it has no power of bringing all the " proper parties before the court, or of ascertaining the " full amount of the debts, the mode of contribution, the " number of the contributors, or the cross equities, and " liabilities which may be absolutely required for a proper " adjustment of all parties as well as of the creditors."

1. *Of course if it be decided that the capital was a trust fund for the creditors, the jurisdiction of equity is undoubted.*

As already quoted, *Curran* v. *Arkansas*, 15 How. 304, *the Court said:* (p. 307.) " If they have been " distributed among stockholders or gone into the hands " of other than *bona fide* creditors or purchasers, leav- " ing debts of the corporation unpaid, such holders " take the property charged with the trust in favor " of creditors, *which a court of equity will enforce*, and " compel the application of their property to the satis- " faction of their debts."

2. *But suppose the other sort of case, that, under the Acts of Congress, the distribution of the money by dividend has been* ultra vires *and illegal.*

In that case also equity has jurisdiction, because, even in that case, the action being brought, as this one is, for the final winding up of the affairs of the bank—the stockholder is entitled to all the remainder of the assets after the debts are paid, and he is therefore entitled to *keep*, as against an action by the receiver, *so much of what he has received as is not necessary for the payment of the debts.* And it follows that a bill lies for a contribution against all

the stockholders, that being the sort of a case in which the solvent stockholders can be made to make up for the shares of those who turn out to be insolvent.

It is well settled in the practice of the equity courts of the United States that, owing to the imperfection of the jurisdiction over the parties, a bill for contribution is properly filed, if filed against all the parties in the jurisdiction, although there may be others, and the most of them, out of the jurisdiction; this, of course, being the sort of case where the parties out of the jurisdiction, though "necessary" in the sense in which that word is ordinarily used, are not "indispensable," as an owner of the equity of redemption in the foreclosure of a mortgage or a part owner of the land in a partition. *Coillon* v. *Millaudon*, 19 How. 113, 115; *Barney* v. *Baltimore*, 6 Wall. 280; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603, 611.

That it happens to turn out in this case that *all* the money paid as dividends is needed, cannot alter the jurisdiction. *Homer* v. *Henning*, 93 U. S., *Stone* v. *Chisolm*, 113 U. S., 302; *Ogilvie* v. *Knox Insurance Co.*, 22 How., 380; *Swan Land and Cattle Co.* v. *Frank*, 148 U. S., 603.

3. *But the question certified is not confined to dividends paid out of capital. It includes dividends made when* insolvent.

The question is—"Has a U. S. Circuit Court jurisdic-
"tion to entertain a bill in equity brought by the receiver
"of a national bank against stockholders *to recover divi-*
"*dends which it is claimed were improperly paid* when
"such suit is brought against two or more stockholders
"and embraces two or more dividends, and when the ob-
"jection that there is an adequate remedy at law is raised
"by the answer?" (R. 3.)

The question is therefore whether equity has jurisdiction of a bill for dividends declared and paid when the bank was *insolvent*.

This is answered by *Curran* v. *Arkansas*, 15 How, 304, and the other cases adjudged by the Court cited above—and so are all the English cases. It is true, that the most of these latter are winding-up cases, which go to the Court of Chancery by statute; but all the other cases are in equity also.

We submit that there are in the books but three cases at law brought to recover dividends.

The first is *Finn* v. *Brown*, 142 U. S. 56, where the question was not raised.

The others are the two Massachusetts cases, *Vose* v. *Grant*, 15 Mass., 505, and *Spear* v. *Grant*, 16 Mass., 9—in each of which the plaintiff was beaten because the action was brought at law, and not in equity.

Both questions should be answered in the affirmative.

EDWARD WINSLOW PAIGE,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1898.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska,

against

GEORGE G. WILLIAMS and JOHN B. DODD.

No. 257.

BRIEF FOR THE DEFENDANTS.

Statement.

This case comes to this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit. The facts certified are as follows:

"The complainant is the Receiver of the Capital National Bank of Lincoln, Nebraska, which suspended payment in January, 1893, in a condition of hopeless insolvency. The stockholders, including the defendants, have been assessed to the full value of their respective holdings, but the money thus obtained added to the amount realized from the assets would not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver to pay 75 per cent. of the claims of the bank's creditor's. This suit was brought to compel the repayment of and accounting for certain dividends paid by the bank to the defendants as holders of capital stock of the bank

of the par value of $5,000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank and not out of net profits. A similar suit was brought against the stockholders resident in Nebraska, and upon appeal from a decree on demurrers was sustained by the Circuit Court of Appeals in the Eighth Circuit, defendants in that case conceding, by their demurrers, that the bank was insolvent when each dividend was paid.

The bank was organized in 1883 with a capital of $100,000, which was increased to $200,000 June 2, 1884, and to $300,000 July 21, 1886. The dividends which were paid from time to time were as follows:

DATE.	AMOUNT PAID IN DIVIDENDS.	DEFENDANT RECEIVED.
1885, Jan. 13	$15,000	$187.50
" July 14	13,000	162.50
1886, Jan. 12	16,000	200.
" July 13	14,000	175.
1887, Jan. 11	18,000	300.
" July 12	18,000	300.
1888, Jan. 10	18,000	300.
" July 10	18,000	300.
1889, Jan. 8	18,000	300.
" July 9	18,000	300.
1890, Jan. 14	15,000	250.
" July 11	15,000	250.
1891, Jan. 13	15,000	250.
" July 13	15,000	250.
1892, Jan. 12	15,000	250.
" July 12	12,000	250.

All dividends except the last were paid to the defendant Williams, a stockholder to the amount of $5,000, from the organization of the bank; the last dividend was paid to defendant Dodd, who bought Williams' stock and

had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend down to and including July, 1891, was declared and paid, there were no net profits, the capital of the bank was impaired, and the dividends were paid out of capital, but the bank was still solvent.

When the dividends of January and July, 1892, were declared and paid, there were no net profits, the capital of the bank was lost and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank and believing the dividends were coming out of profits."

Upon these facts the Circuit Court of Appeals requests the instruction of the Supreme Court concerning the following questions of law:

Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of capital, when the stockholders receiving such dividend acted in entire good faith, believing the same to be paid out of profits, and when the bank at the time such dividend was declared and paid was not insolvent?

Has a U. S. Circuit Court jurisdiction to entertain a bill in equity brought by the receiver of a national bank against stockholders to recover dividends which, it is claimed, were improperly paid, when such suit is brought against two or more stockholders and embraces two or more dividends, and when the objection that there is an adequate remedy at law is raised by the answer?

ARGUMENT.

FIRST.—As to the First Question.

I.

The Receiver cannot recover in the right of the bank, because the bank was never entitled to recover.

I.— *Where a solvent corporation has declared, apparently in the due course of business, a general dividend which is participated in by all the stockholders and received by them in good faith, such dividend is irrevocable, and the corporation cannot recover it back on any ground whatsoever.*

A corporate dividend is in one sense a partition of personal property among joint owners. Each stockholder is thereby deprived of the joint interest which he, through the medium of the corporation, has held in the whole fund, and receives as an exact equivalent his several shares. The mere declaration and payment of a dividend does not enrich the stockholder. This is shown by the fact that the market value of stocks upon which dividends are regularly paid, usually reflects the degree of proximity of the time of payment of the last or the next dividend.

The elementary principles which are applied by the Courts in cases where it is sought to disturb a partition of real or personal property or to obtain relief on the ground of mistake would, we submit, forbid any *several* obligation on the part of stockholders to repay dividends received in good faith.

In all such cases the defendant is entitled to be placed

in *statu quo*—to have restored to him the consideration upon which the division or payment was made.

This result could only be obtained in the case of a corporate dividend by a suit in equity against all the stockholders under these conditions: No transfers must have occurred or equities intervened, all of the stockholders must be solvent and all within one jurisdiction; and even then great hardships and inconveniences would be imposed in so many cases as to render such a remedy inequitable and unjust.

A shareholder cannot ascertain without expert assistance and great expense whether a dividend has really been earned or not. The dividend received and relied upon in good faith may constitute a substantial part or all of the yearly income of a person in moderate circumstances, in which case the reclamation might cause great distress and even ruin.

An executor or trustee might be compelled to repay dividends out of his own pocket after distribution of the estate or of the income. Other instances of hardship and inconvenience may be readily imagined.

It is, therefore, submitted that public policy requires that corporate dividends received in good faith should be irreclaimable.

A restoration of a portion of the dividends only will necessarily result in sheer injustice to some of the stockholders. A stockholder who has sold his stock should certainly not be compelled to contribute to the restoration of a fund in which only the existing shareholders are interested, nor should the transferee be required to repay dividends paid before the transfer, he having bought the stock in good faith relying upon the previous declaration of dividends as a practical certification by the directors and officers of a paid-up and unimpaired capital.

A bona fide purchaser of shares issued by a corporation

as fully paid up cannot be held liable to creditors, though the shares have not in fact been paid up.

Foreman *vs.* Bigelow, 4 Cliff., 508.
Steacey *vs.* Little Rock, &c., R.R. Co., 5 Dillon's C. C. Reports, 348.
3 Thomp. Corp., Sec. 2934.
Morawetz on Corp., Sec. 836.

If by reason of transfers of the stock, death, insolvency or absence from the jurisdiction of some of the stockholders, short statutes of limitations in some of the States, or any other cause, the whole fund cannot be restored, then the repayment by some of the stockholders of a part of the dividends will enure to the benefit of all of the stockholders and thus enrich some at the expense of others.

2. There is no authority for the recovery of dividends by a solvent corporation.

While there are cases where the receiver of an insolvent corporation has been allowed to recover from the stockholders diverted assets, we have been unable to find any case where the corporation itself has brought an action or suit against its stockholders to recover dividends.

II. *The provisions of the National Banking Act exclude any right of action or suit by a national bank to recover dividends on the ground of impairment of capital.*

1. The statute excludes any such right by making ample and complete provision for the restoration of impaired capitals.

"Sec. 5205. Every association which shall have failed "to pay up its capital stock, as required by law, and "every association whose capital stock shall have become "impaired by losses *or otherwise*, shall, within three "months after receiving notice thereof from the Comp-

" troller of the Currency, pay the deficiency in the " capital stock, by assessment upon the shareholders " *pro rata* for the amount of capital stock held " by each; and the Treasurer of the United States " shall withhold the interest upon all bonds held by him " in trust for any such association, upon notification from " the Comptroller of the Currency, until otherwise noti- " fied by him. If any such association shall fail to pay " up its capital stock, and shall refuse to go into liquida- " tion, as provided by law, for three months after receiv- " ing notice from the Comptroller, a receiver may be ap- " pointed to close up the business of the association, ac- " cording to the provisions of section fifty-two hundred " and thirty-four.

" And provided, that if any shareholder or shareholders " of such bank shall neglect or refuse, after three months' " notice, to pay the assessments, as provided in this sec- " tion, it shall be the duty of the board of directors to " cause a sufficient amount of the capital stock of such " shareholder or shareholders to be sold at public auction " (after thirty days' notice shall be given by posting such " notice of sale in the office of the bank, and by publish- " ing such notice in a newspaper of the city or town in " which the bank is located, or in a newspaper published " nearest thereto), to make good the deficiency, and the " balance, if any, shall be returned to such delinquent " shareholder or shareholders."

Revised Statutes, § 5205, as amended by Sec. 4 of Act of June 30, 1876 (chap. 156).

(Section 5141 provides for sale of stock of a shareholder who has failed to pay his subscription).

No personal liability or right of action is attached to the assessment under Section 5205, but the stock of a delinquent shareholder may be sold and the proceeds applied to the deficiency.

Section 5139 provides that every person becoming a shareholder by transfer "shall in proportion to his shares "succeed to all the rights and liabilities of the prior "holder of such shares."

These remedies apply to *all* cases of impairment including impairment by dividends.

An impairment is discovered hy simply ascertaining the amount of present resources and liabilities. It should not then be the duty of the Comptroller to undertake the long and difficult task of investigating the accounts and valuing assets at times past in order to find out how much of the impairment has been caused by dividends, nor is it within his power to decide whether a shareholder is entitled to retain a certain dividend or not, that being a judicial function, but until these matters are ascertained and determined no assessment can be laid except for the whole deficiency.

A summary remedy is required and is intended. The Comptroller must determine at once, not only the existence, but the amount of the deficiency. The power to make one of these determinations necessarily includes the other. And these determinations are conclusive.

It is well settled that the Comptroller's determinations as to the deficiency calling for the assessment under Section 5151 and the amount of such deficiency are conclusive.

Kennedy *vs.* Gibson, 8 Wall., 498.
Casey *vs.* Galli, 94 U. S., 673, 680.

2. We contend that the shareholders of a national bank are entitled as matter of right, in case of any impairment, to have enforced the remedies provided by the charter, and no others.

The association has the option of restoring the capital by the *pro rata* assessment or of going into liquidation and must elect to do one or the other of these things.

The individual shareholder has no option, but must hold himself in readiness to meet and satisfy the onerous demands of the statutory remedies which may be set in motion at any mome... by the Comptroller of the Currency.

The only way in which he can protect himself is to call for the enforcement of those remedies.

To suspend the statutory remedies so that suits may be brought to recover the dividends (the bank meanwhile continuing in business with an impaired capital) would thwart the purpose of the statute to effect a speedy restoration of capital, endanger the interests of shareholders and creditors, and would be destructive of the rights of shareholders to equality of benefit and burden so carefully preserved by the statute.

Actions to recover dividends would be brought against those who received them, but the obligations under the charter are placed upon the shareholders for the time being, such obligations being shifted upon each transfer.

A shareholder repaying a dividend ought thereby to be discharged of all liability, but the attempt to restore the dividends by suit will inevitably result in a deficiency for which the assessment would be laid upon the shareholders who have repaid every dollar of their dividends. In such case the whole deficiency could be made good and the equal rights of the shareholders preserved only by ignoring the repayments and laying the assessment for the whole of the original deficiency and crediting the repayments on the assessments.

Again the association may vote to go into liquidation, in which case any shareholder who has repaid a dividend cannot reclaim it or have it offset against an assessment under Section 5151.

Delano *vs.* Butler, 118 U. S., 634.

But he would have just as completely discharged his liabilities if, like the other stockholders, he had never repaid a dollar.

It is submitted that the rights as well as the obligations of the shareholders are fixed by the statute, and that they cannot be changed or modified as they would be by the

enforcement of remedies other than those expressly provided.

3. The exclusive nature of the remedies provided in the Revised Statutes so far as concerns the matter of restoring impaired capitals of national banks may be further illustrated.

If an impairment existed by reason of the fact that some stockholder had not paid in his subscription, or because his note held by the bank had become bad paper under Section 5,204, or because the cashier of the bank had handed over to such stockholder a sum of money or other assets belonging to the bank, the restoration of the capital by the assessment under Section 5,205 would leave unaffected the liability of such stockholder.

In each of these cases there is a several liability upon contract express or implied which may still be enforced after the capital has been fully restored by new profits or by the voluntary assessment. But could a national bank after its capital has been restored by the voluntary assessment maintain a suit to recover dividends which caused the impairment when the repayment of such dividends would create a surplus which might with perfect propriety be immediately paid back to the stockholders?

4. The Bank could not have recovered the dividends upon the mere ground that the payment thereof was void.

(*a*) It is true that the statute strictly forbids the payment of dividends otherwise than out of net profits, but the same statute by plain and necessary implication forbids the recovery of any dividends by suit and excludes the very existence of any obligation to restore an impaired capital otherwise than by the summary and equitable mode therein provided. The payment of dividends impairing the capital casts the shareholders in obligations under the statute, and therefore such payment cannot be treated as of no effect.

(*b*) The statute (Section 5242) declares that payments to shareholders and creditors after an act of insolvency or in contemplation of insolvency shall be null and void; and *expressio unius est exclusio alterius.*

(*c*) It does not follow because an act is forbidden by law that it can have no valid consequences.

National banks are forbidden to incur liability beyond a prescribed limit; to loan money on real estate security or to loan money to one person or firm exceeding one-tenth of the capital stock; yet it is well settled that violations of these provisions do not render the transactions void, but only lay the bank open to proceedings by the Government for exercising powers not conferred by law.

Thompson *vs.* St. Nicholas Nat. Bank, 146 U. S., 240.

Gold Mining Co. *vs.* Nat. Bank, 96 U. S., 640.

Weber *vs.* Spokane Nat. Bank, 64 Fed. Rep., 208.

(*d*) To hold that such dividends are utterly void according to an iron-clad rule, and that the money paid remains the property of the bank would involve consequences not intended by the statute. According to such view of the case the bank would hold two remedies. It could after a restoration of the capital by a *pro rata* assessment, bring actions and recover the dividends from all the recipients including those who are no longer members of the corporation and thus create a surplus to be divided among present shareholders, while any repayment of dividends *before* the *pro rata* assessment would reduce the amount of that assessment. Such hap-hazard results and inequalities are inconsistent with the whole spirit and purpose of the statute.

5. While the Bank remained solvent no action or suit could have been maintained by the bank or by any of the creditors to reach the dividends in the hands of the shareholders upon the trust fund theory.

The restoration would not have been for the benefit of the creditors, but for the benefit of the bank and its shareholders. The money would be put into the bank's business to be used for the benefit of the shareholders, and upon dissolution would presumably be divided among the shareholders, there being enough other assets to pay the creditors. It was for this very reason that this Court in the case of Delano *vs.* Butler (*supra*) refused to allow a shareholder of a national bank, who had voluntarily contributed to the restoration of an impaired capital, to offset the amount of such contribution against his assessment.

No creditor of the corporation could maintain any action or suit to reach the dividends so long as the bank remained solvent.

The case of Hollins *vs.* Brierfield Coal and Iron Company (151 U. S., 371), seems to us to be directly in point on the last proposition submitted, and to have the most important bearing upon this whole controversy.

This Court there held that simple contract creditors having no lien could not maintain a suit in equity to reach unpaid stock subscriptions. The plaintiff having claimed that as beneficiaries of a trust the creditors of a corporation could go into equity without first exhausting their legal remedies, the Court explained the trust theory applicable to the assets of a corporation. The Court, in its opinion, delivered by Mr. Justice Brewer, say:

"While it is true language has been frequently used to "the effect that the assets of a corporation are a trust "fund held by a corporation for the benefit of creditors, "this has not been to convey the idea that there is a di-

"rect and express trust attached to the property. As said "in 2 Pomeroy's Equity Jurisprudence, Sec. 1046, they "'are not in any true and complete sense trust, and can "'only be called so by way of analogy or metaphor.' To "the same effect are the decisions of this Court." And again: "In other words, and that is the idea which under- "lies all of these expressions in reference to 'trust' in con- "nection with the property of a corporation, the corpora- "tion is an entity distinct from its stockholders as from "its creditors. Solvent it hold its property as any in- "dividual holds his, free from the touch of a creditor "who has acquired no lien; free also from the touch of a "stockholder who though equitably interested in, has no "legal right to the property. Becoming insolvent the "equitable interest of the stockholders in the property, "together with their conditional liability to the creditors, "places the property in a condition of trust, first, for the "creditors, then for the stockholders. Whatever of "trust there is arises from the peculiar and diverse equit- "able rights of the stockholder as against the corporation "in its property and the conditional liability to its "creditors. It is rather a trust in the administration of "the assets after possession by a Court of Equity than a "trust attaching to the property as such for the direct "benefit of either creditor or stockholder."

II.

Complainant as Receiver has no better right to recover the dividends than the bank had and therefore cannot recover.

We are confident that we have established in our first point that the shareholders receiving the dividends in good faith could hold them by good title and right against the bank and its creditors and all the world, so long as the bank remained solvent. After an indefinite period of

time (indefinite because no statute of limitations would run until a right of action accrues), the bank becomes insolvent and a receiver is appointed. The proposition that such dividends can be recovered by the receiver even if the bank could not have recovered seems to be so plainly untenable as to require no argument to refute it.

III.

The dividends having been received in good faith and before insolvency cannot be recovered by the Receiver upon the theory or doctrine that the capital is a trust fund for the creditors.

We contend that the trust doctrine does not mean that the capital of a corporation is absolutely and strictly pledged to the creditors, as that would imply a lien or direct trust, which has been denied by this Court, but rather that the Courts will hold the shareholders to the exercise of good faith toward the creditors.

This view of the trust doctrine is, we believe, in harmony with all the authorities.

The Circuit Court decided in complainant's favor upon the authority of

> Hayden *vs.* Thompson, 71 Fed. Rep., 60; 36 U. S. App., 361, reversing Hayden *vs.* Thompson, 67 Fed. Rep., 273; and Finn *vs.* Brown, 142 U. S., 56.

Hayden *vs.* Thompson is a suit brought by the complainant against the Nebraska shareholders of the Capital Bank, the bill being a paraphrase of the bill in this suit;

but the decision was on demurrer, so that the allegations of fraud and insolvency as to all the dividends were taken as true, and the opinion of the Court shows that such allegations furnished the basis of its decision.

In Finn *vs.* Brown (*supra*) a dividend of twenty-five per cent. was declared twenty days before the bank suspended payments and when the bank was hopelessly insolvent. The defendant was not merely a stockholder, but was one of the directors and the Vice-President and acting cashier of the bank. The questions which the Court considered and passed upon were whether the defendant was a stockholder or not and whether a payment to the president of the bank of dividends received was a repayment to the bank.

Hence these two cases do not answer the question whether dividends paid by a *solvent* corporation can be recovered.

Nor do any of the cases where the trust fund principle has been maintained.

In nearly all of the cases, Federal and State, where the shareholders of a corporation have been required to restore money or assets of a corporation at the suit of or in behalf of creditors, the payment or transfer was made after insolvency or caused insolvency, and nearly all are cases of fraudulent transfers, where the shareholders were affected by notice.

Thus in Wood *vs.* Dummer (3 Mason's R., 308), the bank was in liquidation, its charter having expired and having been continued by statutory enactment from time to time solely to enable it to wind up its affairs and divide its capital stock. The bank simply undertook to pay the stockholders first. Dividends amounting to three-fourths of the capital stock were made. The other fourth had never been paid in. Heavy losses had been sustained, so

that the division left the bank insolvent. Notoriously the assets were held, not for the purpose of doing business or earning dividends, but solely for the purpose of liquidation. The Court held that the stockholders were affected both in law and fact by ample notice, and based the trust fund doctrine on the absence of individual liability of the shareholders.

Bank *vs.* Douglas (1 McCrary, 86). Defendant, who was a director of a construction company and a stockholder, assisted in the passage of a resolution allotting certain bonds among the stockholders, when only sixty per cent. of the capital stock had been paid in. Afterwards by resolution the same bonds were received in payment of an assessment on the stock. The allottment caused insolvency. It was held that the defendant was liable, having diverted to himself the funds which he held as a trustee.

Mumma *vs.* Potomac Co. (8 Peters, 281), involved the transfer of all the property and assets of a corporation on a reorganization.

In Curran *vs.* Arkansas (15 How., 304), the State of Arkansas having undertaken by legislation to withdraw certain assets from the Bank of the State of Arkansas, it was held that the State as a holder of the stock might withdraw the capital, but that as the bank was and had been *insolvent* there was no capital to withdraw.

Sawyer *vs.* Hoag (17 Wallace, 612). A shareholder nominally paying his stock subscription but receiving part back gave a note which was held to be in payment of his subscription and not to secure a loan, and that he could not offset a debt due him from the corporation against the note.

In Hornor *vs.* Henning (93 U. S., 228) it was held that

the amount for which the trustees of a corporation were liable under a statutory provision for incurring indebtedness beyond the amount of the capital stock was a fund for the benefit of all the creditors, and that one creditor could not alone maintain an action at law to enforce such liability.

Vose *vs.* Grant (15 Mass., 505) arose upon the same facts as Wood *vs.* Dummer (*supra*), Bartlett *vs.* Drew (57 N. Y., 587), and Hastings *vs.* Drew (76 N. Y., 9) were cases where the property of the corporation was sold and the proceeds divided among the stockholders. It was not pretended to be a division of profits and was in fact a wrongful conversion of corporate assets to the use of the stockholders as declared in Griffith *vs.* Mangam (73 N. Y., 611).

It is submitted that these cases furnish no support to the proposition that dividends ordinary in amount, paid apparently in due course by a solvent corporation and received in good faith, can be recovered. These cases all stand upon the fundamental principle of equity that the creditors of a corporation have, upon liquidation, the right to be paid in full before anything is paid to the shareholders, and that therefore if a corporation has become insolvent or if its charter has expired, or for any reason it is to be wound up, all of its assets and property are held upon trust for the creditors. Not only would a dividend after insolvency be a breach of this trust, but so would a transfer to shareholders by a solvent corporation of a substantial part of its property, causing insolvency and diminishing its assets below the amount required to pay the creditors. This fundamental principle would be applied to the case of a corporation not required by its charter to maintain a fixed capital. But if a corporation under such a charter should reduce its capital or restore one-half of

the original investment to the stockholders, leaving sufficient to pay all of its debts, and thereafter continue in business, would any principle of equity or law be thereby violated?

We also contend that the trust doctrine as upheld by the foregoing cases and especially as elucidated and defined by this Court in the case of Hollins *vs.* Brierfield Coal & Iron Co. (*supra*), is substantially and sufficiently embodied in the provisions of the National Banking Act, contained in Section 5,242, which provides that "all "deposits of money, bullion or other valuable thing for "its use, or for the use of any of its shareholders or "creditors; *and all payments of money to either*, made "after the commission of an act of insolvency, or in con- "templation thereof, made with a view to prevent the "application of its assets in the manner prescribed by "this chapter * * * shall be utterly null and void."

The trust theory is further illustrated in the cases involving the stock subscription liability. Where that liability, express or implied, has once been created it is an asset of the corporation which must be preserved and any agreement between a corporation and its members cancelling or modifying the contract of subscripiion will be held void. But where a legal liability does not exist no liability can be predicated on the trust doctrine.

Clark *vs.* Bever, 139 U. S., 96.
Handley *vs.* Stutz, *Id.*, 417.

But a purchaser in *good faith* of shares issued by a corporation as fully paid up cannot be held liable to creditors, though the shares have not in fact been paid up.

Foreman *vs.* Bigelow, and other cases cited above at page 6.

An agreement to cancel or modify a stock subscription liability is an attempt not only to violate the charter, but

to annul the very obligations created by it. It is as if the directors should pass a resolution declaring a dividend payable expressly out of the capital and the Court should be asked to compel the payment of such a dividend. To say that the Court would refuse to give effect to such an agreement or resolution is very far from saying that a completed transaction will be overthrown and a right of action or suit given to recover dividends received in *good faith* and relied upon for years because there was a technical though unintentional violation of the statute.

A careful examination of the authorities will, we are confident, disclose this result: That the trust fund doctrine does not of itself furnish the ground of a recovery, it having only been applied in cases where there existed as the foundation of the action a right of recovery upon some fundamental principle, such as the equitable lien of creditors upon the assets of an insolvent corporation, a right of action on the ground of fraud committed by the defendant or the stock subscription liability.

Another limitation which appears to be justified is that the trust liability is not imposed on a shareholder without notice.

The importance of notice as affecting the rights of the stockholders must, we think, be conceded.

A national bank stockholder receiving dividends with knowledge that the capital is thereby impaired, knows that the promises implied by the charter requirements and upon which the public rely are being falsified. He may protect his own interests as well as those of the corporation and its creditors by appealing to the Comptroller of the Currency or by applying to a Court of Equity for an injunction. But a stockholder who receives unearned dividends in good faith, honestly believing them to be earned, instead of being a defrauder, is himself defrauded. Every dividend paid by a corporation is a certificate by

the officers and directors that the corporation is solvent, that its capital is unimpaired, and that it is earning profits. He also has a right to believe that in pursuance of law the bank's accounts are inspected by the official examiners, and its business conducted under the supervision of the Comptroller of the Currency. With all these assurances he not only may believe, but he has a perfect right to believe, himself lawfully entitled to the dividends. Relying upon these assurances, the holder goes on year by year regarding his stock as a valuable investment until it actually becomes a source of grievous injury. Relying upon the dividends he deals with the stock, selling or refusing to sell it, and perhaps foregoing opportunities of making other investments. Relying upon the dividends he is induced to continue in the relation of a shareholder, and incur the risk of being assessed to pay the claims of creditors, until at last he is assessed one hundred per cent. on the par value of his stock, and thus finds that by relying upon the dividends, as he had a right to do, he has sustained loss and damage in twice the amount of his original investment; and then it is proposed that the creditors are to have both the assessment and the dividends.

Should it be said that this stockholder has received the dividends *without consideration?*

"A dividend declared and paid after a proper investi-
"gation of the company's condition and the preparation
"of a balance sheet in good faith is irrevocable both as to
"the company and its creditors though it should after-
"wards turn out that the company was insolvent at the
"time when the dividend was declared."

Morawetz on Private Corporations, Sec. 446, citing Stringer's Case, L.R., 4 Ch., 475.

Our contention that dividends paid out of the capital

but received in good faith may not be recovered is also supported by the following English cases.

In *re* Denham, 25 Ch. Div., 752.

Rance's Case, L.R., 6 Ch., 104.

IV.

The remedies provided by the national banking act are adequate, requiring the shareholders to do more than they would be required to do by the common law or by equity, and are exclusive of any other remedies, not only as to the bank, but as to the Receiver and creditors as well.

The Government may compel a bank with impaired capital to restore the capital or to cease to do business. The bank itself may assess the shareholders *pro rata* for the amount of any deficiency, however caused. And upon liquidation, if the capital is gone and the assets are insufficient to pay debts, the shareholders may, whether they have withdrawn the capital or not, be required to restore the capital once or so far as it may be required to discharge the debts. Thus in all cases of impairment the shareholders are treated as if they had withdrawn the capital, whether they have done so or not.

The defendants in this suit having paid the assessment of one hundred per cent. on the par value of the shares, have paid to the plaintiff for the use of the creditors in whose right he sues an amount exceeding the sum claimed in the bill, and have thus restored once their share of the capital.

But it is claimed that the liability imposed by Section 5151 is cumulative.

The answer to this is that any remedy which law or equity might give for the withdrawal of capital (in the absence of actual fraud or insolvency) or any liability or obligation which may be implied in such cases must be founded on the terms of the very statute containing the remedy which has been enforced. It is argued that these dividends ought to be restored because the creditors have a right to expect that the capital will be maintained, that promise being held out by the charter.

Carrying out this theory and viewing the charter requirements as promises held out to the creditors, the latter can ask or expect no more than the fulfillment of the provisions of the contract according to its terms, and the undertaking of the shareholders is to be gathered from the whole charter and not from a single section merely. That undertaking is not simply that no dividends shall be paid out of or which may impair the capital, but also that if the capital shall become impaired by losses *or otherwise* certain things will be done.

It was, no doubt, anticipated by Congress that in many instances latent impairments of capital might occur through the honest error of directors in valuing assets or through the failure of the officers to discover or report to the directors losses or embezzlements; and that in such cases dividends might be declared and received in good faith while the capital is impaired; and it is quite clear, we maintain, that it is intended in all such cases, no matter how the impairment is caused, to subject the shareholders to a continuing obligation to make good any deficiency of capital by a *pro rata assessment* and to enforce that obligation by a lien upon the stock, and that such lien shall follow the stock and that the obligation shall shift on each transfer and devolve upon the new holder.

Now, so far as the creditors are concerned, the promise held out by the charter is not absolutely that the capital

will be restored by the voluntary assessment, but that if any impairment occurs the capital will be restored or the bank will go into liquidation, and then the shareholders may be assessed one hundred per cent.

The shareholders are in no default; they have answered every call that has been made in pursuance of the statute, and having been treated by the statute as if they had withdrawn the capital, and having discharged the statutory liability, it is now proposed that a Court of Equity should treat them as if they had paid nothing. Because the payment was compelled by statute no equity is to be allowed on account of it, although it was for the benefit of the very creditors in whose behalf this suit is brought.

This is not a case where the statute has created certain obligations, and left to legal implication the remedies by which the obligations are to be enforced. The same statute (or contract) which creates the obligation to maintain the capital prescribes in a specific manner how the obligation is to be enforced, and what is to be done in every case of impairment, *and the implication of a promise to restore the capital in any other way is thereby excluded..*

The whole undertaking of the shareholders is expressed in the charter—nothing is left to implication; and the remedies given by the charter constitute therefore the full measure of the obligations of the shareholders and of the rights of the creditors.

The rule that where a statute creates a new offense and denounces the penalty or gives a new right, and declares the remedy, the punishment or the remedy can be only that which the statute prescribes, has frequently been applied to corporate charters.

Farmers' &c. Nat. Bank *vs.* Dearing, 91 U. S., 29.
Fourth Nat. Bank *vs.* Francklyn, 120 U. S., 747.
Pollard *vs.* Bailey, 20 Wall., 520.
Lowery *vs.* Inman, 46 N. Y., 119.

If Section 5151 of the Revised Statutes had prior to 1884 been amended so as to limit the individual liability of the stockholders to cases of impairment of capital caused by withdrawal by the stockholders, and to the extent of such withdrawal, could this receiver after having enforced such liability maintain this suit and compel the shareholders to repay the dividends a second time? If not, then why should the larger and broader remedy given by the statute as it now stands be considered as cumulative?

By the common law the individual property of the stockholders was not liable for the debts of the corporation under any circumstances.

United States *vs.* Knox, 102 U. S., 422.

A statute imposing such liability should be strictly construed.

Douglass *vs.* Lewis, 131 U. S., 75.

It is submitted that it is not a strict construction of the statute which ascribes to Congress the intention that the obligation to maintain the capital and the liability to the creditors and the remedies given to enforce the same should be cumulative.

Where a national bank shareholder has committed no fraud, but has acted in entire good faith, he should be entitled to *some* protection and should not be subjected to any obligations except those expressly imposed by the statute.

V.

The statutes of the United States furnish the whole law of the case.

1. There is no common law of the United States. Each of the States may have its local usages, customs and com-

mon law. But there is no principle pervading the union and having the authority of law that is not embodied in the constitution or laws of the Union.

Wheaton *vs.* Peters, 8 Peters, 591, 658.
Smith *vs.* Alabama, 124 U. S., 465, 478.
United States *vs.* Hudson, 7 Cranch, 32.

2. While national banks in their dealings with the public may properly be subject to local laws and customs, it is evident that the internal affairs of such corporations and the rights and liabilities of their officers and stockholders can only be regulated by the laws of the sovereignty creating them.

3. The provisions of the Revised Statutes relating to national banks contain the whole law of the case because such was the intention of Congress.

The absence of any common law of the United States and the undesirability of leaving the internal affairs of national banks to the vicissitudes of local laws and usages furnished necessary occasion for a complete system of statute law determining the privileges, powers and duties of the corporation and its officers, and the rights and obligations of the shareholders, and providing all the remedies, civil and criminal, requisite for the enforcement of the Statute.

Apparently recognizing this necessity Congress has enacted just such a complete and comprehensive law, containing elaborate and careful provision, for the organization, government and regulation of national banks and for the winding up of their affairs on dissolution.

In support of this contention, we cite Cook County National Bank *vs.* United States (107 U. S., 445), where it was held that the act authorizing the formation of national banks constituted by itself a complete system for their establishment and government and that the provis-

ions requiring the deposit of security for their circulating notes and for a *pro rata* distribution of the assets in case of insolvency after the redemption of such notes, must be deemed to withdraw national banks from the provisions of the general statutes giving priority to the demands of the United States against insolvents.

SECOND.—As to the Second Question.

If complainant is entitled to recover any of the dividends the remedy is at law.

We maintain that the federal courts have no jurisdiction to entertain any action or suit against the stockholders of a national bank to recover dividends except upon the ground that the dividends were paid after an act of insolvency or in contemplation of insolvency, &c., in violation of Section 5242 of the Revised Statutes, and that if in such case only a money judgment can be had the remedy is at law.

If, as we have previously argued, the provisions of the Revised Statutes concerning national banks are exclusive and furnish the whole law of the case, the shareholders can be subjected to no obligations save those expressly set forth in the statute.

As long as the bank remains solvent, the shareholders, acting in good faith, retain their rights under section 5205. Acting as a body they have the right to elect whether they will restore the capital or go into liquidation. Actual fraud on their part being shown, a dividend might be declared void under section 5242, which was paid before insolvency. But when the bank becomes insolvent the shareholders lose their right to restore the

capital. The Comptroller may then appoint a receiver under the Act of June 30, 1876.

The statutory test of valid payments is not an arbitrary one, but is in accordance with justice and right principles, so that all cases where a recovery ought to be allowed can stand upon the statute.

Statutes making void all grants and alienations of goods and chattels made with intent to delay, hinder and defraud creditors are declaratory of the common law.

Sturtevant *vs.* Ballard, 9 Johns. (N.Y.), 337.

If any dividend was paid in violation of section 5242 of the Revised Statutes, or after insolvency, the payment being void under the statute, the legal right of the complainant to recover the money seems clear.

An action at law for money had and received is then the appropriate remedy.

Gaines *vs.* Miller, 111 U. S., 395.
Cary *vs.* Curtis, 3 Howard, 236, 246.
Litchfield *vs.* Ballou, 114 U. S., 190.
Pierson *vs.* McCurdy, 33 Hun, 520; affirmed on opinion of the Supreme Court in 100 N. Y., 608.
Chapman *vs.* Forbes, 123 N. Y., 532.
Roberts *vs.* Ely, 113 N. Y., 128.

No decree for contribution is required.

The liability, if it exists at all, is not conditional as in the case of the statutory liability to creditors under section 5151, but is absolute. The payment being "utterly null and void," under the statute any shareholder may be compelled to repay the whole amount received in a several action.

While the Comptroller of the Currency may direct the assessment under section 5151 without waiting for the

results of the process of collection (Kennedy *vs.* Gibson, 8 Wall., 498), it would seem that in the adjustment of the accounts the obligation to restore diverted assets should be treated as the prior liability. Also that a new shareholder who has not received the void dividends would be entitled to have all void payments restored, even if a surplus were thereby created, as he would be entitled to share in such surplus.

Hence the prayer of the bill for an accounting to ascertain the amount of the deficiency of assets under liabilities is as unnecessary as it is ineffectual.

The Court below has found that the assets, including the assessment and dividend, will be insufficient to pay the debts, but will this finding prevent the defendants from sharing in a surplus if on the final accounting there should prove to be one?

Complainant being entitled to maintain an action at law and recover the whole amount paid, there was no necessity for a resort to eqnity for any purpose of accounting or contribution.

This is not an action to enforce a trust.

The only decree that can be made in this suit is a decree for a sum of money.

Such a decree if rightly granted will not execute any trust but simply enforce a legal obligation. It is true that the money concerned is trust money, inasmuch as the complainant will hold the money upon a trust when he receives it.

But that trust will remain unexecuted until after the money is paid to the complainant. It was a breach of trust for the officers of the bank to pay the money if the payment was in contemplation of insolvency. So would it be a breach of trust for a testamentary trustee to pay out money belonging to the estate without considera-

tion. But would the action by the trustee to recover such money necessarily be an equity action?

This is not an action of accounting. The only account prayed for in the bill is one that is wholly unnecessary, and that could not be had because of the absence of necessary parties.

There is no question as to the payment of the dividends or as to the amount. The action is not *upon* an account. It is not to recover a balance of an account. The demands are liquidated. There is simply the question of fact; the dividends were paid in contemplation of insolvency or after insolvency, or they were not.

The fact being pleaded and established, recovery follows.

This is a common law action, because if any liability exists, such liability rests upon implied promise, hence the plaintiff cannot come into equity except to obtain some relief which only a Court of equity can grant.

Whatever features of an equitable character may be about the case or connected with it *the case itself* is a common law case.

The rule repeatedly declared by this Court is that "whenever a Court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a Court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Buzard *vs.* Houston, 119 U. S., 347.
Whitehead *vs.* Shattuck, 138 U. S., 151.
Scott *vs.* Neely, 140 U. S., 106.
Insurance Co. *vs.* Bailey, 13 Wall., 616.
Fussell *vs.* Gregg, 113 U. S., 550.
Lewis *vs.* Cocks, 23 Wall., 466.

In Buzard *vs.* Houston the Court in its opinion, delivered by Mr. Justice Gray, said: "In cases of fraud or "mistake as under any other head of chancery jurisdic- "tion, a Court of the United States will not sustain a bill "in equity to obtain only a decree for the payment of "money by way of damages, when the like amount can "be recovered at law in an action sounding in tort or for "money had and received."

It also seems to be well established that whatever exceptions may exist to the general rule they do not include a case where a court of equity is asked to give, or only can give relief of a legal nature. Thus Mr. Justice Field, writing the opinion of the Court in Whitehead *vs.* Shattuck (*supra*), said: "It would be difficult and per- "haps impossible to state any general rule which would "determine in all cases what should be deemed a suit in "equity as distinguished from an action at law, for par- "ticular elements may enter into consideration which "would take the case from one court to the other; *but* "*this may be said that where the action is simply for the* "*recovery and possession of specific real and personal* "*property, or for the recovery of a money judgment the* "*the action is one at law.*"

"Whenever a new right is granted by statute or a new "remedy for the violation of an old right, or whenever "such rights and remedies are dependent upon state "statutes or acts of Congress, the jurisdiction of such "cases as between the law side and the equity side of the "Federal Courts must be determined by the essential "character of the case, and unless it comes within some "of the recognized heads of equitable jurisdiction it must "be held to belong to the other."

Van Norden *vs.* Morton, 99 U. S., 378.

The federal courts will not compel the execution of a conveyance or render a decree to quiet title where ejectment would constitute an adequate remedy.

Whitehead *vs.* Shattuck (*supra*).

Lewis *vs.* Cocks (*supra*).

One who has an equitable title or right cannot obtain relief of a legal character in equity, on the ground that he cannot recover at law. To give a court of equity jurisdiction, the nature of the relief asked for must be equitable even when the suit is based on an equitable title.

Fussell *vs.* Gregg, 113 U. S., 550.
Smith *vs.* Bourbon Co., 127 U. S., 105.

A suit in equity cannot be maintained merely for an account of profits against an infringer of a patent; such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court.

Root *vs.* Railway Co., 105 U. S., 189.

Where money is loaned to a municipality in violation of law, if any liability on implied promise exists, that liability can only be enforced at law.

Litchfield *vs.* Ballou, 114 U. S., 190.

If any claim should be made that the remedy at law is inadequate, because the question of insolvency being in issue, the case cannot be conveniently tried before a jury, or because of any other difficulty, impediment or inconvenience in the prosecution of an action at law, we reply that this is a common law action, because the liability sought to be enforced rests upon implied promise, and that the case comes under the Seventh Amendment to the Constitution, which declares that suits in common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, and that it would be entirely subversive of the constitutional provision for courts of equity to take jurisdiction of a common law case, and execute common law remedies, on the sole ground that the prosecution of the same remedies in courts of law would be

attended with difficulties; and that it would be especially obnoxious to the constitutional purpose to take such a case from the courts of law, on the ground that the remedy at law is inadequate, by reason of the mode of trial which is favored and preserved by the constitution.

If the first question should be answered in the affirmative, the right to recover the dividends paid out of capital would still rest upon implied promise, and the remedy would be at law, in accordance with the rules established by the cases above cited.

We have attached hereto a copy of the opinion of Judge Wheeler sustaining the demurrer in a suit brought in the District of Vermont by the complainant in this suit, the case not having been reported.

THEODORE DE WITT,
GEORGE G. DE WITT,
Counsel for the Defendants.

UNITED STATES CIRCUIT COURT,

DISTRICT OF VERMONT.

KENT K. HAYDEN *vs.* ADNA BROWN *et al.*	In Equity.

The orator is Receiver appointed by the Comptroller of the Currency of the Capital National Bank of Lincoln, Nebraska, organized under the banking laws of the United States June 2, 1884, and in operation to January 23, 1893; and which declared and paid semi-annual dividends of six per cent. from December, 1886, to June, 1889; of five per cent. from thence to December, 1891; and of four per cent. June, 1892. Some of the defendants were severally shareholders during all this time, and partook of all these dividends, and the rest were during a part of the time, and partook of the dividends while they were shareholders. This bill is brought to recover these dividends as made from the capital stock, against all the shareholders in this district; and is demurred to for misjoinder of the defendants; for adequacy of remedy at law, and for want of equity.

That dividends made from the actual capital of corporations needed to pay debts are recoverable back is elementary; and that they may be recovered by a bill in equity, brought against all who can be reached, where the corporation is situated, to wind up its affairs seems clear; but proceedings, brought elsewhere, merely for the collection of the money lack the grounds for equitable relief on

which such bills are usually maintained. In Finn *vs.* Brown, 142 U. S., 56, an action at law was upheld and tried by jury for the recovery from a shareholder of such a dividend. This shows that claims against shareholders for the recovery merely of the money are distinctly several; and also that Receivers of national banks have a full, adequate and complete remedy at law for the collection of such claims when nothing more is sought. No fraud of these shareholders about these dividends is alleged; nor knowledge even of dividends from anything but profits is charged, beyond the general allegation that "the oft-repeated fact" of such dividends was well and long known to many of the defendants, without saying which dividends or to which defendants.

This falls far short of any fair allegation of anything that any particular defendant would be called upon to answer for discovery of any ground for relief.

Nothing is sought but the money, which if recoverable a judgment at law would bring.

The claim that the dividends were made from capital stock are founded upon allegations that the expense account was large, and great losses were sustained, so that there were no net earnings or clear profits from which to make dividends; and that this situation was concealed from the Comptroller of the Currency and the creditors. These allegations are not inconsistent with the carrying on of the business in regular course according to the laws of the United States; nor contrary to the disappearance of net earnings and profits through depreciation of assets apparently good. Dividends from apparent net profits, made in due course according to law, cannot very well be said to be divisions of capital, although based upon assets which turn out so poorly as to show now that there were in fact no profits at all to be divided; especially after such long acquiescence (Witters *vs.* Sowles, 31 Fed. Rep., 1).

The loss from such shrinkage may as justly, perhaps, fall upon the bank as upon the shareholders.

Demurrer sustained.

HOYT H. WHEELER.

JAMES A. BROWN and
WILDER L. BURNAP,
For Plaintiff.

DANIEL ROBERTS,
For Defendants.

No. 257.

Petition for Rehearing.

Supreme Court of the United States,

OCTOBER TERM, 1898.

NUMBER TWO HUNDRED AND FIFTY-SEVEN.

JOHN W. McDONALD, AS RECEIVER,

Appellant,

against

GEORGE G. WILLIAMS AND JOHN B. DODD.

PETITION FOR REHEARING.

Supreme Court of the United States,

OCTOBER TERM, 1898.

NUMRER 257.

JOHN W. MCDONALD, as Receiver-Appellant,

against

GEORGE G. WILLIAMS and JOHN B. DODD.

Now come the defendants and respectfully petition this Honorable Court for a rehearing of the above-entitled cause, for the following reasons, to wit:

Because the first question certified having been answered in the negative, it does not appear that the complainant may not still recover the dividends of January and July, 1892, inasmuch as the certificate states that "When the "dividends of January and July, 1892, were declared "and paid there were no net profits, the capital of the "ban was lost, and the bank actually insolvent" (Record, fol. 3). Hence it appears that the first question does not cover all of the dividends, and that, notwithstanding the answering of the first question in the negative, judgment for the last two dividends and for a large amount of costs may still be entered against the defendants.

It is respectfully requested, therefore, that the Court

answer the second question certified. And your petitioners pray that an order may be made for a rehearing of the argument in this case on a day to be appointed by the Court, at such time and upon such points as the Court may direct.

Mr. Paige has authorized us to state that he admits sufficient service of notice of this petition.

GEORGE G. DEWITT,
THEODORE DEWITT,
Attorneys for Defendants, Williams and Dodd.

I hereby certify that this petition for a rehearing is presented in good faith and that I believe it is based on meritorious grounds.

Attorney for Defendants.

McDONALD, Receiver, *v.* WILLIAMS.[1]

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 257. Argued April 21, 1899. — Decided May 15, 1899.

The receiver of a national bank cannot recover a dividend paid to a stockholder not at all out of profits, but entirely out of capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and when the bank, at the time such dividend was declared and paid, was not insolvent.

THIS suit was commenced in the Circuit Court of the United States for the Southern District of New York. It was brought by the plaintiff, as receiver of the Capital National Bank of Lincoln, Nebraska, for the purpose of recovering from the defendants, who were stockholders in the bank, the amount of certain dividends received by them before the appointment of a receiver.

Upon the trial of the case the Circuit Court decreed in favor of the plaintiff for the recovery of a certain amount. The defendants appealed from the decree, because it was not in their favor, and the plaintiff appealed from it, because the recovery provided for in the decree was not as much as he claimed to be entitled to. Upon the argument of the appeal in the Circuit Court of Appeals certain questions of law were presented as to which that court desired the instruction of this court for their proper decision.

It appears from the statement of facts made by the court that the bank suspended payment in January, 1893, in a condition of hopeless insolvency, the stockholders, including the

[1] The docket title of this case is Hayden, Receiver, *v.* Williams.

defendants, have been assessed to the full amount of their respective holdings, but the money thus obtained, added to the amount realized from the assets, will not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver, to pay seventy-five per cent of the claims of the bank's creditors.

This suit was brought to compel the repayment of certain dividends paid by the bank to the defendants on that part of the capital of the bank represented by their stock of the par value of $5000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits.

A list of the dividends and the amount thereof paid by the bank from January, 1885, to July, 1892, both inclusive, is contained in the statement, and it is added that all dividends, except the last, (July 12, 1892,) were paid to the defendant Williams, a stockholder to the amount of $5000, from the organization of the bank. The last dividend was paid to the defendant Dodd, who bought Williams' stock, and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend, down to and including July, 1891, was declared and paid, there were no net profits. The capital of the bank was impaired and the dividends were paid out of the capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank, and believing the dividends were coming out of the profits.

Upon these facts the court desired the instruction of this court for the proper decision of the following questions:

First question. Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of the

profits, and when the bank, at the time such dividend was declared and paid, was not insolvent?

Second question. Has a United States Circuit Court jurisdiction to entertain a bill in equity, brought by a receiver of a national bank against stockholders to recover dividends which, as claimed, were improperly paid when such suit is brought against two or more stockholders and embraces two or more dividends, and when the objection, that there is an adequate remedy at law, is raised by the answer?

Mr. Edward Winslow Paige for appellant.

Mr. Theodore De Witt for appellees. *Mr. George G. De Witt* was on his brief.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

It will be noticed that the first question is based upon the facts that the bank, at the time the dividends were declared and paid, was solvent, and that the stockholders receiving the dividends acted in good faith and believed that the same were paid out of the profits made by the bank.

The sections of the Revised Statutes which are applicable to the questions involved herein are set forth in the margin.[1]

---

[1] Sec. 5199. The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Sec. 5204. No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period

The complainant bases his right to recover in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion

---

of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

SEC. 5205. (As amended by section 4 of the act approved June 30, 1876, 19 Stat. 63.) Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four: *And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

SEC. 5140. At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in instalments of at least ten per centum each, on the whole amount of the capital, as frequently as one instalment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each instalment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

SEC. 5141. Whenever any shareholder, or his assignee, fails to pay any instalment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circula-

thereof, and having been paid in the way of dividends to the shareholders that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. He also bases his right to recover upon the terms of section 5204 of the Revised Statutes.

We think the theory of a trust fund has no application to a case of this kind. When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation.

In *Graham* v. *Railroad Company*, 102 U. S. 148, 161, it was said by Mr. Justice Bradley, in the course of his opinion, that "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. And a court of equity, at the instance of the proper parties, will

---

tion in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be cancelled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

SEC. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount vested in such shares. (The balance of this section is immaterial.)

then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

And in *Hollins* v. *Brierfield Coal & Iron Company*, 150 U. S. 371, 383, 385, it was stated by Mr. Justice Brewer, in delivering the opinion of the court, and speaking of the theory of the capital of a corporation being a trust fund, as follows:

"In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And also:

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or, sometimes, even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock

subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

Other cases are cited in the opinion as holding the same doctrine.

In *Wabash &c. Railway Company* v. *Ham*, 114 U. S. 587, 594, Mr. Justice Gray, in delivering the opinion of the court, said:

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.

The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

It is contended on the part of the complainant, however, that if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the assets of the corporation has sunk below the amount of its debts, although as yet unknown to anybody, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however,

the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it *bona fide* and for value. The assets of the bank while it is solvent may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say, that if such a dividend be recoverable, it would be on the principle of a trust fund.

Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be and it sometimes is quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is, even in such case, may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency.

Hence it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different

principles than in a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved in order to show the act was one committed in contemplation thereof.

Without reference to the statute, therefore, we think the right to recover the dividend paid while the bank was solvent would not exist.

But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language

implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly yet in entire good faith receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case.

We are strengthened in our views as to the proper construction of this act by reference to some of its other sections. The payment of the capital within a certain time is provided for by sections 5140 and 5141. Section 5151 provides for the individual responsibility of each shareholder to the extent of his stock at the par value thereof in addition to the amount invested therein. (These shareholders have already been assessed under

this section.) And section 5205 provides for the case of a corporation whose capital shall have become impaired by losses *or otherwise*, and proceedings may be taken by the association against the shareholders for the payment of the deficiency in the capital within three months after receiving notice thereof from the Comptroller. These various provisions of the statute impose a very severe liability upon the part of holders of national bank stock, and while such provisions are evidently imposed for the purpose of securing reasonable safety to those who deal with the banks, we may nevertheless say, in view of this whole system of liability, that it is unnecessary, and that it would be an unnatural construction of the language of section 5204 to hold that in a case such as this a shareholder, by the receipt of a dividend from a solvent bank, had withdrawn or permitted to be withdrawn any portion of its capital.

We may concede that the directors who declared the dividend under such circumstances violated the law, and that their act was therefore illegal, but the reception of the dividend by the shareholder in good faith, as mentioned in the question, was not a wrongful or designedly improper act. Hence the liability of the shareholder should not be enlarged by reason of the conduct of the directors. They may have rendered themselves liable to prosecution, but the liability of the shareholder is different in such a case, and the receipt of a dividend under the circumstances is different from an act which may be said to be generally illegal, such as the purchase of stock in one national bank by another national bank for an investment merely, which is never proper. *Concord First National Bank* v. *Hawkins*, just decided, *ante*, 364.

The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it, is to assert that it is payable out of the profits. As the statute has provided a remedy under section 5205 for the impairment of the capital which includes the case of an impairment produced by the payment of a divi-

dend, we think the payment and receipt of a dividend under the circumstances detailed in the question certified do not permit of its recovery back by a receiver appointed upon the subsequent insolvency of the bank.

The facts in the various English cases cited by counsel for complainant are so entirely unlike those which exist in this case that no useful purpose would be subserved by a reference to them. Not one holds that a dividend declared under such facts as this case assumes can be recovered back in such an action as this.

We answer the first question in the negative. The second question relates to the jurisdiction of a court of equity over an action of this nature. It is evident that the question was propounded to meet the case of an affirmative answer to the first question.

In that event the second would require an answer. As we answer the first question in the negative, and the second question was scarcely touched upon in the argument, we think it unnecessary to answer it in order to enable the court below to proceed to judgment in the case.

The first question will be certified in the negative.